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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**UTILITARIANISM AND LIBERAL RELIGIOUS APPROACH AND ISLAMIC  
CORPORATIONS: DISTORTION VS. PROTECTION OF CLASSICAL ISLAMIC  
LAW**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for  
the LL.M. Degree in International and Comparative Law**

**By**

**Nehal Brain Abd Elrahman Mohammed**

**June 2012**

The American University in Cairo  
School of Global Affairs and Public Policy

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CORPORATIONS: DISTORTION VS. PROTECTION OF CLASSICAL ISLAMIC LAW

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School of Global Affairs and Public Policy  
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UTILITARIANISM AND LIBERAL RELIGIOUS APPROACH AND ISLAMIC  
CORPORATIONS: DISTORTION VS. PROTECTION OF CLASSICAL ISLAMIC LAW

Nehal Brain Abd Elrahman Mohammed

Supervised by Professor Gianluca Parolin

ABSTRACT

Utilitarianism and liberal religious approaches constitute two important results of *Muhammed Abdou's* project for modernizing Islamic law. Utilitarianism religious approach has dominated the Islamic legal field since the 19th century, the era of nationalist awakenings when *Al-sanhurī* introduced his project on modernizing Islamic law. It requires cutting and pasting the supporting opinions to any argument from different Islamic schools of law. Liberal religious approach started gaining importance lately by modern Islamic scholars as a result of the increasing modern problems that were never discussed by classical Islamic scholars. It requires the reinterpretation of the main sources of Islamic law. The comparison between both approaches is important in revealing their effect on the content and organization classical Islamic law. The case of corporations constitutes the common discussed issue by both approaches. Modern Islamic scholars disagree on the adopted approach that reveals whether Islamic law recognizes corporations as legal persons or it does not. On one hand, *Zahraa* provides the jurisprudential bases for *Sanhurī's* argument on the legal personality concept in Islamic law. He contends that Islamic law recognizes legal personality. *Zahraa* faced the problems of the lack of any classical discussions concerning legal personality and the lack of the legal personality terminology. Therefore, he adopted the selective approach on two different levels. On the first level, *Zahraa* selected the Islamic schools that declare the presumed legal status of the fetus and the missing persons in which the concepts of *'ahliyyat al-wujūb* and *dhimma* are inherent. On the second level, he selected both concepts and applied them on Islamic entities. On the other hand, Kuran is the only modern scholar who adopted liberal approach in case of corporations. He contends that classical Islamic law does not recognize corporations as legal persons. Kuran reinterpreted Islam's call for community building stated in the *Qur'ān*. This call is meant to replace the pre-Islam tribal system. Kuran contends that this call implicitly prevented the formation and the development of groups that enjoy personhood since they may affect Muslims' solidarity in the Islamic East. He supported his argument when he introduced the establishment of corporations in the Christian west where the call for community building did not exist. This explains why the historical development of entities in the Islamic East does not show any incorporated form of entities a few years after the advent of Islam. This is specifically applied to the *waqf*. However, a millennium later, although the effect of this call diminished, other reasons contributed to the stagnation of Middle Eastern organization. The comparison between both approaches is important in revealing their effect on the content and structure of classical Islamic law. This comparison concluded in that although *Zahraa* perceives a distorting method to the classical Islamic writings to prove that Islamic law recognizes legal status of Islamic entities, Kuran perceives a protecting method to the classical Islamic writings to prove that Islamic law does not recognize corporations as legal persons.

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## Introduction

Does Islamic law recognize corporations? I wonder. I am at *Sanhuri's* theatre at Cairo University attending a lecture on corporations in Islamic law delivered by Timur Kuran a Professor of Economics and Law.<sup>1</sup> He argues that "classical Islamic law recognizes only natural persons; it does not grant standing to corporations."<sup>2</sup> Kuran adopts "liberal religious approach"<sup>3</sup> in proving his argument. Liberal approach requires reinterpreting the main Islamic sources of Islamic law, the *Qur'ān* and the *Sunnah*, without relying on classical Islamic scholars' interpretations. The lack of classical scholars' discussions concerning corporations prompted Kuran to search for the *Qur'ānic* text that prevented the establishment of corporations in the Islamic East till the modern era. According to Kuran, Islam's call for community building prevented the establishment of corporations.

At the rise of Islam, Islam's call for community building was meant to replace the pre-Islam tribal system that prevailed in the Arabian Peninsula.<sup>4</sup> According to Kuran, Islam's call for community building prevented the formation of groups that enjoy personhood, and prevented the development of some Islamic practices to be incorporated since these practices contradict with the required solidarity in the community.<sup>5</sup> He considers that this call implicitly prohibits the establishment of corporations. Kuran supported his argument through providing the Christian West experience.<sup>6</sup> The lack of this call in the West led to the establishment of corporations.<sup>7</sup> Moreover, the emergence of Christianity in the strong Roman state resulted in the development of corporations in order to stand against of the strong Roman state at that time.<sup>8</sup>

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<sup>1</sup> Timur Kuran, *The Absence of the Corporation in Islamic Law*, 53 A. J. Comp. L. 785, 5 (2005). Timur Kuran is a Turkish economist, Professor of Economics and Political Science, and Gorter Family Professor in Islamic Studies at Duke University. His teaching and research draw on multiple disciplines, including economics, political science, history, and legal studies

<sup>2</sup> *Id.*, at 785.

<sup>3</sup> See generally WAEL B. HALLAQ, *SHARI'Ā THEORY..PRACTICE..TRANSFORMATIONS* 60-71 (Cambridge University Press 2009).

<sup>4</sup> Kuran, *supra* note 1, at 794.

<sup>5</sup> *Id.*, at 785.

<sup>6</sup> *Id.*, at 789-94.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Liberal religious approach constitutes an output of *Muhammed Abdou's*<sup>9</sup> project for modernizing Islamic law. "Utilitarianism religious approach"<sup>10</sup> constitutes the second output of *Muhammed Abdou's* theological idea. This approach requires selecting, or cutting and pasting, from different Islamic jurisprudences the opinions and the concepts of classical Islamic jurists that prove a certain argument. *Zahraa*<sup>11</sup> selected the opinions and concepts of classical Islamic scholars that prove that natural (*al-shakhsiyyah al-tabiiyyah*) and juristic persons (*al-shakhsiyyah al-e'tebariyyah*) enjoy legal personality (*al-shakhsiyyah al-qanuniyyah*).

With regard to natural persons, *Zahraa* selected the opinions that declare the presumed status of the fetus and missing persons. These declarations constitute the beginning and end of the natural legal personality.<sup>12</sup> The importance of this choice lies in that natural legal personality constitutes the first step in determining the equivalent Islamic concept to legal personality concept of juristic persons due to the lack of any related discussions. Concerning juristic persons, *Zahraa* selected the Islamic concepts '*ahliyyat al-wujūb* and *dhimma* that form the legal personality concept of juristic persons.<sup>13</sup> He followed their development to conclude that the concept of '*ahliyyat al-wujūb* is the core issue of legal personality, and the concept of *dhimma* is the attribute to legal personality that is enjoyed by Islamic entities such as the *waqf*.<sup>14</sup> In addition, he excluded the *Hanafi* opinion that denies that the *waqf* enjoys a separate *dhimma* from that of its administrator.<sup>15</sup>

This paper compares between both approaches concerning the case of corporations as legal persons. This comparison targets to find out their effect on the classical Islamic law. It focuses on two main points of comparison. The first point relates to their effect on the classical content. Although the selective approach forms a hodgepodge of

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<sup>9</sup> HALLAQ, *supra* note 3, at 214. *Hallaq* illustrated that theologically, both approaches take the broad outline of *Muhammed Abdou's* doctrine. Also, they share the same goal which is the reformulation of legal theory that synthesis basic religious values of Islam and introduce a substantive law that is suitable for the modern needs of the society. However, they differ in the method they used to reach this end. *Hallaq* focused on that they dominate the Muslim world today.

<sup>10</sup> *Id.*, at 3.

<sup>11</sup> Mahdi Zahraa, *Legal Personality in Islamic Law*, 203, Arab Quarterly 193 (1995). Mahdi Zahraa is an English prominent professor at Glasgow School for Business and Society at Glasgow Caledonian University. He is interested in International Law, Islamic and Middle Eastern Law and International Contract Law.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, at 203-04.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, at 205-06.



different opinions disregarding their theological and legal differences, the liberal approach opens the gate for constituting a consistent legal incorporated entity that is directly based on the main sources of Islamic law. The second point concerns their effect on the structure of classical writings. Although the selective approach reverses the structure of these writings in order to constitute an Islamic corporation, the liberal approach allows the establishment of a new parallel legal incorporated entity that will replace the classical Islamic unincorporated ones.

The importance of comparing between utilitarianism and liberal religious approach in case of corporations cannot be ignored for three reasons. The first reason is that it shows how the application of similar ideological ground approaches leads to contradicting conclusions. Both approaches emerged from *Muhammed Abdou's* theological ground. However, while the selective approach concluded that classical Islamic law recognizes corporations as legal persons, the liberal approach denied their existence. The second reason is that the example of corporations constitutes the only example that is dealt with by both approaches. This shall guarantee the neutrality of the bases of comparison. The third reason is that both approaches agree on the non existence of explicit discussions on the legal personality concept or on corporations in classical Islamic law. This ensures fairness in comparison.

This paper argues that while utilitarianism religious approach perceives a distorting method to the classical Islamic writings in order to prove that Islamic law recognizes corporations, liberal religious approach perceives a protecting method to the classical Islamic writings even if it proves that Islamic law does not recognize corporations. Part I of this paper describes how *Zahraa* adopted the selective approach in order to prove that Islamic law recognizes legal personality that constitutes the main characteristic for the establishment of corporations. Part II details how *Kuran* reinterpreted the Islam's call for community building stated in the *Qur'ān* through focusing on that it implicitly prevented the establishment of corporations in the Islamic East. Part III compares between both approaches concerning their effect on the content and organization of classical Islamic law.

## **I. Utilitarianism Religious Approach and Legal Personality**

*Zahraa* adopted utilitarianism religious approach in order to prove that Islamic law recognizes legal personality concept that is enjoyed by natural and juristic persons. On one hand, *Zahraa* selected from the available classical discussions on natural legal personality the opinions that declare the presumed legal status of the fetus and the missing person. These presumptions determine the beginning and end of natural legal personality that corresponds to the living status of a human being that starts when it is born alive and ends upon its death. On the other hand, *Zahraa* selected from natural personality the Islamic concepts of legal capacity and *dhimma* and followed their development due to the lack of classical discussions on legal personality of juristic persons. He concluded that the concept of *dhimma* is the attribute to legal personality that is vested upon Islamic entities, like the *waqf*, that are recognized by Islamic law as possessing a legal personality.

This chapter is divided into three parts. In the first part, the importance of *Zahraa's* focus on the presumed legal status of the fetus and the missing persons is introduced. Additionally, the terminological difference between Islamic law and western law is introduced. In the second part, *Zahraa's* adoption of the selective approach in proving that Islamic law recognizes natural legal personality is introduced. This selection focuses on the opinions of classical Islamic scholars that declare the presumed living status of the fetus, and the presumed death of the missing persons. In the third part, *Zahraa's* adoption of the selective approach in determining the Islamic concepts that constitute juristic legal personality is introduced. This selection focuses on the concept of *dhimma* that is proved to be the attribute to the legal personality concept. In addition, he proved that the *waqf* enjoys a separate *dhimma* from that of its administrator.

### **A. The Concept of Legal Personality in Islamic**

*Zahraa* faced two main problems in proving that Islamic law recognizes the concept of legal personality. The first problem is that classical scholars' discussions focus on the legal status of natural persons like the fetus and missing persons that

enjoy certain rights and bear certain obligations. There are no similar discussions concerning Islamic entities. The second problem is that the term of legal personality is not available in Islamic law. But it is a western concept that means the characteristic of a non-living entity regarded by law to have the status of personhood.

*Zahraa* followed how some classical scholars, that he selected their opinion, declared the presumed legal status of natural persons, represented in the fetus and missing persons, in order to conclude that these scholars presumed equally the legal status of Islamic entities. This means that presuming the legal status of natural persons presents the guidelines for presuming the legal status of Islamic entities. However, due to the lack of classical discussions concerning Islamic entities, *Zahraa* reversed these guidelines to start from where classical scholars concluded in declaring the presumed legal status of natural persons.

Consequently, *Zahraa* found that in both presumptions, the Islamic concepts of '*ahliyyat al-wujūb*' and *dhimma* are inherent. The concept of '*ahliyyat al-wujūb*' means the capacity to acquire rights and bear obligations. It constitutes one of the elements of Islamic legal capacity (*al-'ahliyyah*). The concept of *dhimma* is used to define a presumed container that includes the religious and financial rights and obligations of a person. As a result, *Zahraa* selected both concepts to prove that they form the legal status of Islamic entities. And he started to apply these concepts on the *waqf* in order to conclude that classical scholars presumed its legal status. The *waqf* in this case was used as an example for other Islamic entities.

In both cases, natural persons and Islamic entities, *Zahraa* adopted utilitarianism religious approach. Concerning natural persons, declaring the presumed legal status of the fetus and the missing persons is controversial. *Zahraa* selected the opinions that declare these presumptions and disregarded the other ones. Concerning Islamic entities, he selected the Islamic concepts of '*ahliyyat al-wujūb*' and *dhimma* that constitute the legal status of natural persons to apply on Islamic entities, especially the *waqf*. In addition, he neglected the *Hanafi* opinion that considers the *dhimma* an attribute to human being.

*Zahraa* concluded from the presumed legal status of natural persons and Islamic entities that both of them enjoy legal personality. This is attributed to that a right in abstract without a person is a definite legal impossibility. And thus, the existence of every right must always relate to a person who is able, or presumed able, to enjoy it.

And in this case, natural persons, represented in the fetus and missing persons, and Islamic entities are presumed able to enjoy certain rights, and yet bear certain obligations. As a result, a person can either be a natural or juristic person. Additionally, there are two types of legal personality in Islamic law.

According to *Zahraa*, legal personality concept (*al-shakhsiyyah al-qanuniyyah*) in Islamic law has a broader definition than that of the western one. It includes two types of legal personalities. The first type is the natural legal personality (*al-shakhsiyyah al-tabi'eiyyah*) that corresponds to the living status of a human being that starts when it is born alive and ends upon its death. It is exclusively attributed to the qualities of human beings. This personality is enjoyed by the fetus and missing persons. The second type is the juristic legal personality (*al-shakhsiyyah al-e'tebariyyah*) that is vested upon those entities which are recognized by law to have the status of personhood. This personality is enjoyed by Islamic entities like the *waqf*.

In this paper, *Zahraa* uses Islamic and Western terminologies interchangeably. This requires determining clear demarcation between both of them. The first concept is *al-'ahliyyah*. It corresponds to the western concept of legal capacity since both of them mean the capacity of a person to acquire rights, bear obligations and power to conduct actions and transactions that are able to produce their legal effects. However, *al-'ahliyyah* has two concepts: the concept of *'ahliyyat al-wujūb* that means the capacity to acquire rights and bear obligations and the concept of *'ahliyyat al-'adā'* that means capacity to conduct one's affairs by oneself. *Zahraa* concluded that although both of them are equally important, *'ahliyyat al-wujūb* is the core issue of legal personality.

The second concept is *dhimma*. In classical Islamic law, it is used to define a presumed container that includes the religious and financial rights and obligations of a person. According to *Zahraa*, the concept of *dhimma* corresponds to the Western concept of legal personality. However, since there are two legal personalities in Islamic law, *Zahraa* deduced the existence of two types of *dhimma*: a natural and a juristic *dhimma*. A natural *dhimma* is enjoyed by natural persons that enjoy both religious and financial rights and obligations. It corresponds to the natural legal personality. And a juristic *dhimma* is enjoyed by non-living entity that enjoys only financial rights. It corresponds to the juristic legal personality.

## **B. The utilitarianism approach and Natural Legal Personality**

Classical Islamic jurists disagreed on defining the exact moment of birth and that of death of a human being. This disagreement stems from that human beings enjoy certain rights and bear certain obligations before birth, in the case of fetus, and after death, in the case of missing persons. While some scholars declared the presumed living status of the fetus and the missing persons, other scholars refused to declare this status. *Zahraa* selected the opinions that declare these presumptions. In addition, he proved that both cases constitute natural legal personality. This part constitutes an important ground for proving the legal personality of juristic persons. In this part, the study of the declaration of the presumed living status of the fetus will be followed by the study of the declaration of the presumed death of the missing persons.

### **1. Utilitarianism Approach: The Fetus Presumed Living Status**

*Zahraa* detected the existence of the presumed living status of the fetus from the existence of two living statuses in Islamic law: the living status of a full human being, and the living status of the fetus.<sup>16</sup> Scholars disagree on declaring the living status of the fetus. Some sporadic views deny this declaration.<sup>17</sup> The *Shafi'i*, *Hanbali*, *Maliki* and *Shi'i* schools of law<sup>18</sup> consider that the living status of a full human being starts when the whole body of the baby is delivered alive.<sup>19</sup> *Zahraa* concluded that the separation of the baby from its mother is one of the attributes of natural legal personality.<sup>20</sup> However, he considered that according to their opinion, the fetus enjoys a restricted personality<sup>21</sup> to the right of compensation if it was killed or injured due to a crime committed against its mother. But the *Hanafi*, the *Zahiri* schools<sup>22</sup>

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<sup>16</sup> *Zahraa*, *supra* note 11.

<sup>17</sup> SAYED SABEQ, *FIQH AL-SUNNAH* 3 at, 646 (Dar Al-Kitab Al-'Arabi, 1983).

<sup>18</sup> *Zahraa*, *supra* note 11, at 196.

<sup>19</sup> *See* SABEQ, *supra* note 17; MANSOUR AL-BAHOUTI, *AL-RAUOD AL-MURBE' BI-SHARHI ZAD AL-MUSTAGNE'-MUKATASAR AL-MUQNE'* 1 at 292 (Al-Maktabah Al-Thaqafiyah).

<sup>20</sup> *Zahraa*, *supra* note 11.

<sup>21</sup> *Shakhsiyyah Naqisah*. This means that the personality is limited to receiving compensation for the injury of the fetus.

<sup>22</sup> *Zahraa*, *supra* note 11, at 194-96.

status. Accordingly, the fetus personality is not limited to the entitlement compensation.

#### a. The Declaration of the Fetus Presumed Living Status

*Zahraa* selected the *Hanafi* and *Zahiri* Schools because they provide two decisive requirements for the declaration of the living status of the fetus.<sup>23</sup> And thus, they introduce decisive starting point for the natural legal personality. The first requirement is that the medical test proves that the fetus was alive when or before the crime against its mother was committed. The second requirement is that the age of the fetus is 120 days or over. *Zahraa* supported his choice of these schools on that these requirements introduced by both schools can be identified by modern technology.<sup>24</sup> On one hand, modern technology can identify whether the fetus was alive or not when the crime against its mother was committed. On the other hand, Modern technology can identify whether the baby's death or injury was caused by the crime or not.<sup>25</sup>

On one hand, *Zahraa* derived the first requirement from the *Hanafi* School of law.<sup>26</sup> This school believes that during pregnancy, the fetus has either a factual or presumed living status.<sup>27</sup> The fetus enjoys a factual living status when the major part of its body is delivered alive and a presumed living status "when it is delivered stillborn because of a crime committed against its mother."<sup>28</sup> Accordingly, if the fetus was killed during the pregnancy upon an attack on its mother, it has two rights. The first right is the right of Inheritance, including that of the bequeathed will and also its heirs can inherit from the fetus.<sup>29</sup> The second right is the right of compensation as a result of the crime without need for *Kaffarah*<sup>30</sup> unless the defendant performs it voluntarily.<sup>31</sup>

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<sup>23</sup> *Id.*, at 196. *Zahraa* deducted these requirements from both schools.

<sup>24</sup> *Id.*

<sup>25</sup> This means that modern technology can prove the causal relationship between the crime committed against the mother of the fetus and the death or injury caused to the fetus accordingly.

<sup>26</sup> It believes that "the living status of a human being starts when the major part of the baby's body is delivered alive." ABD AL-RAHMAN AL-SABOUNI, AL-MADKHAL LIDIRASAT AL-FIQH AL-ISLAMĪ 2 at, 19,29 (AL-Matba'ah Al-Jadidah, 4th ed., 1978). It is the translation of *Zahraa*. *Zahraa*, *supra* note 11, at 194.

<sup>27</sup> AL-SABOUNI, *supra* note 26, at 19.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; SABEQ, *supra* note 17, at 646, 596; AHMAD MOUSTAFĀ AL-ZARKĀ, AL-MADKHAL AL-FIKHĪ AL-ĀM 3 at, 746 (6th edn., 1959).

<sup>30</sup> *Kaffarah* means "what is paid to redress an imbalance or to compensate for commissioning a sinful act, i.e. a kind of punishment or penalty," available at <http://english.bayynat.org.lb/fatawa/s6ch.htm>.

On the other hand, *Zahraa* derived the second requirement from the *Zahiri* School of law. This school believes that the living status of the fetus starts when it attains the age of 120 days. They base their argument on that the *Qu'rān* and the *hadith* state that the fetus will have a soul at the age of 120 days.<sup>32</sup> This school differentiates between two stages of the pregnancy period in the entitlement to compensation.<sup>33</sup> The first period concerns the first four months of the pregnancy. In this stage, if the fetus was subject to a crime, only its mother will be entitled to compensation.<sup>34</sup> The second period covers the fifth month up to the delivery date. If the crime was committed during the second stage, the criminal would have to pay compensation and suffer the *Kaffarah*.<sup>35</sup> The compensation in this case belongs only to the fetus and its heirs if it dies as a result of the crime.<sup>36</sup>

Relying on the two requirements for the declaration of the living status of the fetus, *Zahraa* concluded that the fetus enjoys legal personality,<sup>37</sup> if the medical test proves that the fetus was alive when or before the crime against its mother was committed and if the age of the fetus is 120 days or over. However, *Zahraa* ignored two groups of Islamic schools in proving his argument. According to the first group, the fetus enjoys restricted personality that is limited to the right of compensation. And according to the second group, the fetus does not have the right to receive any compensation since the crime was committed against the mother and not the fetus.

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*Zahraa* provided another definition which "is a form of religious duty that is imposed on wrongdoers in order to help them to repent and purify themselves. The usual form of the relevant *kaffarah* is the freeing of a slave, or alternatively fasting for two consecutive months." *Zahraa*, *supra* note 28, at 194 n.11.

<sup>31</sup> SHAMS AL-DĪN AL-SARKHĪ, *KITĀB AL-MABSŪT AL-MA'DHŪN AL-KABĪR* 26 at 87-89 (Dar Al-Ma'rifah).

<sup>32</sup> IBN HAZM, *AL-AYSAL FI AL-MUHALLA BI AL-AATHAR* 236 (Dar Al-Kutob Al-'Ilmiyyah, Beirut).

<sup>33</sup> *Zahraa*, *supra* note 11, at 195.

<sup>34</sup> *Ghurrah*. See 'UMAR IBN ISHĀQ GHAZNAWĪ & MUḤAMMAD ZĀHĪD IBN AL-ḤASAN KAWTHARĪ, *AL-GHURRAH AL-MUNĪFAH FI TAḤQĪQ AL-IMĀM ABĪ ḤANĪFAH* (Al-Maktabah Al-Azharīyah lil-Turāth, 1998).

<sup>35</sup> IBN HAZM, *supra* note 32, at 236-37.

<sup>36</sup> *Id.*

<sup>37</sup> *Zahraa*, *supra* note 11, at 196. He admitted that his opinion agrees with that of *Zarka*. AL-ZARKĀ, *supra* note 28, at 752-53 n.1.

### **b. Non-Declaration of the Fetus Presumed Living Status**

*Zahraa* manifestly disregarded the *Hanbali*, *Maliki*, *Al-Shafi'ie* and *Shi'i* schools of law. According to them, the fetus enjoys a restricted personality and is entitled to receive only the right of compensations,<sup>38</sup> if a crime was committed against its mother that affected the fetus.<sup>39</sup> But the fetus does not enjoy the right of inheritance, including that of the will and *waqf*, "because of the uncertainty regarding its living status prior to the crime against it, or its mother."<sup>40</sup> According to some scholars,<sup>41</sup> the fetus enjoys living status that is based on the concepts of *ahliyyat al-wujūb*<sup>42</sup> and *dhimma*.<sup>43</sup> In this case, *ahliyyat al-wujūb* is restricted to compensation because the fetus is subject to the possibility of life and death,<sup>44</sup> and *dhimma* is absolute.<sup>45</sup> In addition, he disregarded sporadic opinions that deny declaring the presumed living status of the fetus because he can not prove that it enjoys legal personality.

*Zahraa* disregarded the *Hanbali* School because the living status is enjoyed by the baby "if it shows indicative signs like crying, sneezing, or moving in a way which expresses that it is alive."<sup>46</sup> This requires the separation of the fetus from its mother in order to show these indications. However, this school allows the fetus the right of compensation.<sup>47</sup> In addition, it allows the fetus the right of bequeathed will,<sup>48</sup>

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<sup>38</sup> *Zahraa*, *supra* note 11.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> AL-MAWSU'AH AL-FIGHIYYAH 16 at,119 (WAZARAT AL-AWQAF WA AL-SH'OON AL-ISLAMIYYAH, KUWAIT).

<sup>42</sup> It constitutes one of the two concepts of legal capacity in Islamic law. It means the capacity to acquire rights and bear obligations. The second concept is '*ahliyyat al-'ada*'. It means the ability to capacity to conduct one's affairs by oneself. Both concepts will be discussed in details in the next part.

<sup>43</sup> It means a presumed container that contains the financial and religious rights and obligations of a person. It will be discussed in details in the next part.

<sup>44</sup> AL-SABOUNI, *supra* note 26 at, 75.

<sup>45</sup> *Zahraa* translated this opinion of *Al-Bazdawi* from the Islamic Jurisprudence Encyclopedia. AL-MAWSU'AH AL-FIGHIYYAH, *supra* note 25.

<sup>46</sup> *Id.*, at 17. As a result, if a baby shows these signs, it becomes able to inherit from others and others can inherit from it.

<sup>47</sup> AL-BAHOUTI, *supra* note 19.

<sup>48</sup> *Wassiyah. Id.*, at 375-77.



Also *Zahraa* excluded the *Maliki*<sup>49</sup> and *Al-Shafi'i*<sup>50</sup> because they recognize the living status of a full human being when three conditions are attained: the baby is delivered, separated from its mother and additionally, makes an indicative sign to its living status such as crying, moving, breathing or sneezing. However, they give the fetus the right of compensation even though they differ in determining the time at which the fetus enjoys this right. The *Maliki* School gives the right of compensation to the fetus throughout the whole pregnancy period including its very early stage.<sup>51</sup>

*Al-Shafi'i* school gives the fetus the right of compensation when it gets to the stage of forming a human being image, such as having eyes or fingers.<sup>52</sup> This is achieved when the fetus is prematurely delivered dead or alive due to a crime committed against itself or against its mother. According to this school, proving that the fetus has developed such features requires the fetus to be subject to expert examination or the testimony of four women since women are presumed to have a better knowledge in this issue. Also, *Al-Shafi'ie* gives the fetus, with certain conditions, the right of bequeathed will.<sup>53</sup>

The *Shi'i* school was ignored by *Zahraa* because it declares the living status of the fetus at the very early stage of pregnancy if the fetus "shows signs such as a sound and allowed into the world, or a sign that exceeds those actions that did not constitute a sign of life."<sup>54</sup> If such a fetus survives, according to the *Shi'i* school, the fetus enjoys the right of compensation including bequeathed will.<sup>55</sup> If the fetus dies, its parents are obliged to compensate the fetus according to its stage of development in the womb including the early stages of pregnancy.<sup>57</sup> Like the *Maliki* School, this school declares the living status of the fetus at the very early stage of pregnancy.

Moreover, *Zahraa* disregarded the opinion of some other jurists that denies the right of the fetus to enjoy any rights including the right of compensation. *Zahraa*

<sup>49</sup> MALIK IBN ANAS AL-ASBAHI, AL-MODAWWANAH AL-KUBRAA, 1 at, 855-856; SABEQ, *supra* note 17, at 646.

<sup>50</sup> AL-SHAFI'IE, MUKATASAR AL-MUZANNI at, 549.

<sup>51</sup> AL-ASBAHI, *supra* note 49 at, 481.

<sup>52</sup> AL-SHAFI'IE, *supra* note 50.

<sup>53</sup> ABI ZAKARIYYA M.D. IBN SHARAF AL-NAWAWI, AL-MAIMOU' SHARH AL-MUHAZZAB 15 at, 420 (Dar Al-Fikr).

<sup>54</sup> JAMAL AL-DEEN M. AL-SIYOURI AL-HILLY, AL-TANQEEH AL-RA'E LI MUKATASAR AL-SHARA'E 2 at, 368 (Matba'et Al-Khaiyyam, 1984).

<sup>55</sup> *Id.*, 2 at 204.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, at 517, 522, 205.

disregarded these opinions since proving that the fetus enjoys legal personality is based on declaring the living status of the fetus. These scholars relied on that the crime is committed against the mother of the fetus and not against it. Consequently, the mother is the only one who should be given the compensation. This opinion is adopted by *Al-Laith Ibn Sa'eed*<sup>58</sup> and *Rabi'ah Ibn Abd Al-Rahman*.<sup>59</sup> In addition, it is also the opinion of the *Zahiries* when the fetus is less than 120 days old. And it is the opinion of the *Shafi'i* school if the fetus has not developed a human being image.<sup>60</sup>

In short, *Zahraa* adopted the utilitarianism religious approach in order to prove that Islamic law declares the presumed living status of the fetus. According to *Zahraa*, this declaration means that the fetus enjoys legal personality. *Zahraa* selected the *Hanafi* and *Zahiri* schools' opinions that declare this living status and additionally, they provide the two decisive requirements for declaring the legal personality of the fetus. This is why he disregarded other Islamic schools that limit the personality of the fetus to the right of compensation. Also, he did not rely on the opinions that deny the living status of the fetus. Besides declaring the living status of the fetus, classical Islamic scholars declared the presumed death of the missing persons.

### **1. Utilitarianism Approach: The Missing Person Presumed Death**

*Zahraa* detected the existence of the presumed death of the missing persons from the existence of two deaths in classical Islamic law: a certain death and a presumed death. He selected the opinions of some classical scholars that declare the presumed death of the missing persons despite their unknown status for the sake of their relatives. "Missing persons are those persons who have disappeared without any communication or information as to whether they are dead or alive or concerning their whereabouts."<sup>61</sup>

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<sup>58</sup> He is titled the *'Imam, Faqih, Hafiz, Fegah, Shaikh al-Islam* in Egypt. He was born in the village of Qlqhandh Qaliubiya Delta of Egypt in the year 94 AH.

<sup>59</sup> SABEQ, *supra* note 17, at 646.

<sup>60</sup> AL-SABOUNI, *supra* note 26, at 20.

<sup>61</sup> *Zahraa*, *supra* note 11, at 196-97.

### a. The Missing person Presumed Dead Declaration

*Zahraa* found that the *Hanafi*, *Hanbali*, *Shi'i*, *Maliki*, *Shafi* schools of law declare the presumed death of missing persons. They relied on the practice of the prophet companions due to the lack of clear provisions in the *Qur'an* and the *Sunnah* regarding the missing persons. This practice requires declaring the presumed death of missing persons after a period of time until proven otherwise. There are two practices. The first practice is that of *Omar*,<sup>62</sup> *Othman*,<sup>63</sup> and *Ali*<sup>64</sup> in some of his decisions. They "were of the opinion that the declaration of missing persons' presumed death can be decided upon the lapse of four years since their disappearance."<sup>65</sup> The second opinion is that of *Sa'eed Ibn Al-Mussayyeb*.<sup>66</sup> He "is of the opinion that the declaration of presumed death can be carried out after one year in abnormal circumstances and four years in normal circumstances."<sup>67</sup>

*Zahraa* selected these schools that declare the presumed death of the missing persons and rely on it to prove that declaring the presumed death of missing persons constitutes the end of natural legal personality. These schools constitute the majority of Islamic schools of law. *Zahraa* disregarded the disagreement between these schools concerning the determination of the period of time that should lapse in order to declare the presumed death of missing persons. This is attributed to that, contrary to the fetus case, he did not stipulate any requirements for the declaration. In parallel, *Zahraa* disregarded an opinion of the *Shafi* and another of the *Zahiri* Schools of law that refuse to declare the presumed death of the missing person.

*Zahraa* relied on the *Hanafi* School<sup>68</sup> since it believes<sup>69</sup>

Therefore, missed persons are presumed dead after the lapse of a certain period of time because there is a "need to establish stable legal relationships in the

society." This declaration results in legal consequences concerning the missing person's marriage and properties. Additionally, other legal consequences result from the missing person's return after declaration.

<sup>62</sup> *Omar Ibn Al-Khattab* later became the second Muslim caliph. He succeeded Caliph *Abu Bakr* the first caliph in Islam.  
<sup>63</sup> *Othman Ibn Affan* was the third Muslim caliph.  
<sup>64</sup> *Ali Ibn Abi Taleb* was cousin and son-in-law of the Islamic Prophet Muhammad.  
<sup>65</sup> IBN HAZM, AL-AYSAL FI AL-MUHALLA BI AL-AATHAR 12 at, 35 (Dar Al-Kutob Al-'Ilmiyyah, Beirut).

<sup>66</sup> *Saeed Ibn Al-Musayyeb Ibn Hezn Ibn Abi Wahb Makhzoumi Qurashi*, his nickname Abu Mohammed, was born to two years of the succession of *Omar Ibn Al-Khattab*, a senior scholars in the *Hadith*, *Fiqh* and interpretation of the *Qur'an*, is a master of the scholars of the city and the followers.

<sup>67</sup> IBN HAZM, AL-AYSAL FI AL-MUHALLA BI AL-AATHAR 9 at 321 (Dar Al-Kutob Al-'Ilmiyyah, Beirut).

<sup>68</sup> This school agrees with a second narration on behalf of *Ali*.

natural causes."<sup>70</sup> *Zahraa* disregarded their disagreement on determining "the maximum age of death of the missing persons' contemporaries" in normal<sup>71</sup> and abnormal<sup>72</sup> circumstances. "If the person has been missing in normal circumstances, some *Hanafi* jurists consider that age to be 70 years, others believe it to be 80 years, and Abu *Yusif* believes this age to be 100 years."<sup>73</sup> But if the person has been missing during abnormal circumstances, the judge would have to order an extensive search using every possible means to find the missing persons. If despite such search they could not be found then, judge can issue a declaration of their presumed dead basing his decision on "the most likely possibility."<sup>74</sup>

Also, *Zahraa* chose the *Hanbali* School since it declares the presumed death of the missing persons in normal and abnormal circumstances. If the missing persons disappeared in normal circumstances, the judge would have to order an extensive search using every possible means to find them. If they could not be found or their whereabouts could not be known then the *Hanbalies* have two views. The first agrees with the *Hanafies* that the judge must wait until their contemporaries who are of the same age naturally die and then declare their presumed death.<sup>75</sup> The second view is that if the judge exhausted all possible means and could not find the missing persons then he can use his discretionary power to decide the appropriate to declare their presumed death.<sup>76</sup> If the missing persons have been missing in abnormal circumstances, a declaration of their presumed death can be issued four years after their disappearance.<sup>77</sup>

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<sup>69</sup> They argue that the living status of the missing persons is more likely based on the "possible ~~that "missing people cannot be presumed dead until their contemporaries who are of the same age die of death.~~ ~~communion of the status quo" under the Hanafi principle and there is no clear evidence regarding their death.~~

<sup>70</sup> SHAMS AL-DĪN AL-SARKHSĪ, KITĀB AL-MABSŪT AL-MA'DHŪN AL-KABĪR 11 at 34-36 (Dar Al-Ma'rifah); This is also one of two opinions of Al-Shafi'ie and a famous narration on behalf of Malik, see SABEQ, *supra* note 17, 3 at 652; AL-NAWAWI, *supra* note 53, 18 at 158.

<sup>71</sup> Normal circumstances are when the missing persons' safety could be more likely such as during travelling or seeking education.

<sup>72</sup> Abnormal circumstances are when the missing persons' death is more likely and their life would be in real danger such as war.

<sup>73</sup> AL-SARKHSĪ, *supra* note 70, at 35-36.

<sup>74</sup> *Ghalabet al-Dhun*. AL-SARKHSĪ, *supra* note 31, 11 at 34.

<sup>75</sup> MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNĪ, AL-AHWAL AL-SHAKHSFYIAH FI AL-AHLYYAH WA AL-WASFYIAH WA AL-TARIKAT 168 (Al-Maktaba'ah Al-Jadiih, 5th ed. 1978); AL-BAHOUTI stated that the maximum age of death of people is 90. AL-BAHOUTĪ, *supra* note 19, 1 at 293.

<sup>76</sup> See MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNĪ, *supra* note 75; See also SABEQ, *supra* note 17, 3 at 653.

<sup>77</sup> MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNĪ, *supra* note 75, at 166.

*Zahraa's* reliance on the *Shi'i* school<sup>78</sup> is because it provides two conditions for the declaration of the missing persons' presumed death. The first condition for declaring the presumed death of the missing persons is the lack of any information as to whether the missing persons are alive or dead or their whereabouts. The second condition for declaring the presumed death of missing persons is that the missing husband does not have a guardian<sup>79</sup> who is able to provide the necessary maintenance for the missing person's wife and dependents.<sup>80</sup> It is noticeable that this school does not provide any period of time for the person to be declared a missing person. Nevertheless, this did not prevent *Zahraa* from relying on the opinion of this school since it adopts the declaration.

The *Maliki* School provides a supporting opinion to *Zahraa's* argument. This school requires that the judge can declare the missing husband presumed dead upon request from his wife four years after his disappearance.<sup>81</sup> It is noticeable that this "declaration is valid only in respect of his wife" since she is the only one who has the right to deliver the request to the judge. Regarding his properties, "the presumed death declaration cannot be effective until his contemporaries of similar age die." This is the same requirement mentioned in the *Hanafi* Islamic school. The *Malikies* base their argument on the principle that the living status is presumed to continue to exist until there is evidence to the contrary. This school maintains the *status quo*.

Additionally, *Zahraa* relied on the *Shafi'i* school since it declares the presumed death of missing persons. It adopts the opinion that agrees with the views of the *Maliki* School and adds that "if the persons are missing because they were captured by the enemy as prisoners of war then the declaration of their presumed death cannot be carried out until their death is known for sure."<sup>82</sup> This school has another opinion that agrees with that of *Omar Ibn Al-Khattab* mentioned above that declares the presumed death of the missing persons upon the lapse of four years since their disappearance.<sup>83</sup>

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<sup>78</sup> *Zahraa* said that it agrees with the *Hanbali* School.

<sup>79</sup> *Waly*.

<sup>80</sup> AL-SIYOURI AL-HILLY, *supra* note 54, 3 at 345-47.

<sup>81</sup> MALIK IBN ANAS AL-ASBAHI, AL-MODAWWANAH AL-KUBRAA 2 at, 92-93; MALIK IBN ANAS AL-ASHAHI, AL-MUATTA' 2 at, 575; See also SABEQ, *supra* note 17, 3 at 651-52.

<sup>82</sup> AL-SHAFI'IE, AL-'UMM 225; see also AL-NAWAWI, *supra* note 53, at 158; AL-SHAFI'IE, AL-MUKETASAR, AL-MUZANNI 225.

<sup>83</sup> AL-NAWAWI, *supra* note 53, 18 at 225.

companions of the Prophet who favor the declaration of presumed death four years after the missing person's disappearance.<sup>84</sup>

In parallel, *Zahraa* disregarded other opinions of classical Islamic scholars that refused to declare the presumed death of missing persons. The first opinion is that of the *Shafi'i* school in one of its opinions. This opinion agrees with that of the *Hanafies* and *Ali Ibn Abi Talib* in one of the narrations on his behalf. It refuses to declare the missing persons presumed dead.<sup>85</sup> The second opinion is that of the *Zahiri* School that believes that "nobody has the right to declare the missing persons presumed dead whether they have been missing in normal or abnormal circumstances because their death is not known for sure."<sup>86</sup> Consequently, missing persons, according to these schools, do not enjoy rights or bear obligations since they are not presumed dead. This is contrary to the selected schools *Zahraa* that stipulate legal consequences on this declaration.

#### **b. Legal Consequences of the Declaration**

The importance of *Zahraa's* selection lies in that according to the selected schools, certain legal consequences result from this declaration concerning the missing person's wife and properties. In addition, certain legal consequences result from the return of the missing person after the declaration of his presumed death concerning his wife and properties. These consequences prove that the natural persons after death still enjoys certain rights and bears certain obligations until their legal status is settled. *Zahraa* did not rely on the discussions of one selected school, but he introduced all the opinions and reorganized them in a manner that resulted in having two types of legal consequences: the legal consequences of the presumed dead declaration and the legal consequences of the return of the missing person. In each type, their effect on the missing person's marriage and properties are discussed.

In addition, *Ibn Hazm*, from the *Zahiri* School, has an extensive research regarding this ~~1) The Legal Consequences in the Presumed dead Declaration~~ majority of the

*Zahraa* showed that the presumed dead declaration produces certain legal consequences on the missing person's marriage and properties. First of all, the

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<sup>84</sup> IBN HAZM, *supra* note 67, at 316-328, 327.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*, at 316.

presumed dead declaration produces an instant effect on the marriage meaning that it puts an end to it from the date of the declaration.<sup>87</sup> The date of the declaration works as the date of the factual death. Accordingly, the wife has to start her waiting period on the date of the declaration, as if the missing husband has died that day.<sup>88</sup> As a result, and according to the main rule concerning the waiting period that a woman must observe after the death of her spouse, she has to wait four months and ten days after the death of a spouse.<sup>89</sup> During this period, she may not marry another man.

Secondly, *Zahraa* showed that the presumed dead declaration produces certain legal effects on the missing person's properties that Jurists disagreed on. On one hand, the *Hanbalies*,<sup>90</sup> the *Hanafies*<sup>91</sup> and the *Shafi'ies*<sup>92</sup> believe that the missing persons' properties must be distributed according to the inheritance rules to those who are entitled to inherit from them. This is performed on the date of the declaration as if the missing persons died that day. On the other hand, the *Malikies* believe that the distribution of the missing persons' properties cannot be undertaken until their contemporaries who are of the same age die.<sup>93</sup> And the inheritors will be those who are entitled to inherit from the missing persons on the said date.<sup>94</sup> Moreover, the *Malikies* give the wife of the missing person the right to inherit from her husband even if she has married another man after the declaration of his death provided that the second marriage has not been consummated.<sup>95</sup>

With regard to a missing persons right of inheritance during the period of disappearance jurists have two views. The first view is that of the *Hanafies*<sup>96</sup> and the *Malikies*.<sup>97</sup>

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<sup>87</sup> MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, *supra* note 75, at 175.

<sup>88</sup> *Id.*; see e.g. AL-SARKHSI, *supra* note 31, at 34-37.

<sup>89</sup> It is calculated on the number of menses that a woman has. There is another period that a woman must observe after a divorce. The period is three months after a divorce and four months and ten days after the death of a spouse.

<sup>90</sup> AL-BAHOUTI, *supra* note 19, at 293.

<sup>91</sup> AL-SARKHSI, *supra* note 31, at 34-49.

<sup>92</sup> AL-SHAFI'IE, AL-'UMM, *supra* note 82, at 225; see also AL-NAWAWI, *supra* note 53, at 158; AL-SHAFI'IE, MUKETASAR, AL-MUZANNI *supra* note 50, at 225. See ABI ZAKARIYYA M.D. IBN SHARAF AL-NAWAWI, AL-MAIMOU' SHARH AL-MUHAZZAB 18 at, 225 (Dar Al-Fikr).

<sup>93</sup> AL-ASBAHI, *supra* note 81, at 94.

<sup>94</sup> *Id.*, at 95.

<sup>95</sup> *Id.*, at 94.

<sup>96</sup> AL-SARKHSI, *supra* note 31, at 34-39; MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, *supra* note 75, at 178.

<sup>97</sup> AL-ASBAHI, *supra* note 81, at 95; MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, *supra* note 75, at 175-76.

has a retrospective effect regarding their right to inherit from others."<sup>98</sup> This means that they cannot inherit from others during their disappearance retroactively. By analogy to the legal position of the fetus, *Al-Sarkhasi*<sup>99</sup> considers that the missing person's portion of inheritance, by law or bequeathed will, is kept aside for them until their status is known for certain. Once such persons come back they receive what is kept for them. However if a missing person did not come back the kept properties would be returned to the original inheritors rather than the missing person's own heirs.

The second view is that of the *Shafi'ies*<sup>100</sup> and the *Hanbalies*.<sup>101</sup> They are of the opinion that the instant effect of the presumed dead declaration is applicable also in the case of the missing person's right to inherit from others. This means that the missing persons are entitled to receive inheritance from others during the period of their disappearance up to the date of declaring them presumed dead. And the properties received due to the exercise of this right must be added to their properties before distributing them to their inheritors.

### 1) The Legal Consequences of the Return of the Missing Person

Also, *Zahraa* showed that the return of the missing person produces certain legal consequences on the missing person's marriage and properties. With regard to the missing person's marriage, he introduced two opinions. The first opinion is that of the *Hanafites* and *Al-Zahiries*. It distinguishes between the return of the missing person during the waiting period, and the effect of declaring the missing person presumed dead during the waiting period, the decision of divorce which is based on the presumed dead declaration is revocable.<sup>102</sup>

<sup>98</sup> *Zahraa*, *supra* note 11, at 200.

<sup>99</sup> *AL-SARKHSI*, *supra* note 31, at 43-49.

<sup>100</sup> *AL-SHAFI'IE*, *AL-'UMM*, *supra* note 82, at 225; *AL-SHAFI'IE*, *AL-MUKETASAR*, *AL-MUZANNI*, *supra* note 50, 225; *AL-NAWAWI*, *supra* note 53, at 158.

<sup>101</sup> *AL-BAHOUTI*, *supra* note 19, at 293.

<sup>102</sup> "*Raj'ie*". *AL-SARKHSI*, *supra* note 70, at 38; *IBN HAZM*, *AL-AYSAL FI AL-MUHALLA BI AL-AATHAR* 9 at 325-28 (Dar Al-Kutob Al-'Ilmiyyah, Beirut).



The second way is by acting in a manner which would convey his intention to take her back.

But if the return of the missing person is after the expiry of the waiting period, it is necessary to differentiate between two situations. The first situation is achieved if the wife is still single. In this case, the divorce is irrevocable. This means that the resumption of marriage must be based on concluding a new marriage contract and new formalities. The second situation occurs if the wife has married another man. In this case, the second marriage contract is valid whether it is consummated or not.<sup>103</sup> And the missing person's return does not have any effect on the second marriage whatsoever.

The second opinion equates between the return of the missing person during the waiting period, and his return after the expiry of the waiting period. On one hand, the second caliph *Omar 'Ibn Al-Khattab* and *Ali 'Ibn Abi Taleb* consider that "the divorce that is based on the declaration of the presumed death of the husband is not revocable but final and conclusive similar to the real death situation."<sup>104</sup> This means that the resumption of marriage is impossible. The wife in this case must observe a waiting period for four months and ten days after the death of a spouse. And the return of the husband does not have any effect whatsoever regardless of whether his return was during the waiting period or after the expiry of the waiting period.

On the other hand, *Al-sarkhasī* who belongs to the *Hanafi* School considers that "the declaration of presumed death is based on a mere assumption that the missing person is thought to be dead."<sup>105</sup> As a result, the return of the missing person proves that the assumption was wrong. And the declaration would be null and void and the spouse can resume their marriage as if the husband was still present. But if the missing personage with his wife without marriage contract, and the wife's second marriage contract is valid and the resumption of marriage must be undertaken by the husband and he always and the first consummated, her husband is a legal fact that makes him marry her again as his wife.<sup>106</sup>

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<sup>103</sup> Some jurists differentiate between two situations depending on whether the second marriage has been consummated or not. See AL-ASBAHĪ, *supra* note 81, at 91-93; and IBN HAZM, AL-AYSAL FI AL-MUHALLA BI AL-AATHAR 9 at, 327 (Dar Al-Kutob Al-'Ilmiyyah, Beirut).

<sup>104</sup> See AL-SARKHSĪ, *supra* note 70, at 37.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> AL-ASBAHĪ, *supra* note 81, at 91; IBN HAZM, *supra* note 67 at 325-28 (Dar Al-Kutob Al-'Ilmiyyah, Beirut).

<sup>108</sup> MUSTAFĀA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, *supra* note 75, at 178.

second husband was aware, before getting married, that the missing person was alive, as this knowledge constitutes a sufficient ground to make his marriage null and void."<sup>109</sup>

The legal effects of the return of the missing persons depend on whether he returned before the distribution or after the distribution of their properties. If the missing persons returned before the distribution of their properties to the inheritors, they can resume effective control over their properties as if they had never been absent. But if the return occurred after the distribution of the properties to the inheritors, they can retrieve from the inheritors only what is left of these properties. As for the portions of the properties which were depleted before their return, the missing persons would have no legal claim either to retrieve them or receive compensation against the inheritors. This is because the depletion of their inheritance was based on a valid judicial decision, that is, the declaration of the missing person presumed dead.<sup>110</sup>

The same rules apply also to the properties which the missing person is entitled to receive as inheritance including bequeathed will and *waqf* from others. The missing persons can in this case only retrieve what is left of these properties and have no legal right to retrieve or receive compensation regarding the depleted portion of these properties if their depletion has been based on the declaration of their presumed death. The missing person can also retrieve all those properties which were kept aside pending their return.<sup>111</sup> *Al-Siba'ie* and *Al-Sabouni* contend that the missing person should also be able to retrieve those properties which were substituted for other kinds of properties and these latter properties are still in the hands of the inheritor, for instance, if one of the inheritors bought a house using the money that he received as inheritance from the missing person.<sup>112</sup>

*Zahraa* adoption of the utilitarianism religious approach led him to prove that natural legal personality is recognized in Islamic law. This is attributed to that *Zahraa* selected the classical Islamic scholars' opinions that declare the presumed living of the fetus and the presumed death of missing persons. In addition, he disregarded the opinions that deny declaring these presumptions or do not meet the stipulated requirements, especially in the fetus case. This means that Islamic law recognizes

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<sup>109</sup> *Id.*

<sup>110</sup> MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, *supra* note 75, at 177.

<sup>111</sup> AL-ASBAHI, *supra* note 81, at 95.

<sup>112</sup> MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, *supra* note 76, at 178.

legal personality of natural humans. In addition, he adopted the selective approach in reaching the legal consequences of the declaration. Due to the lack of similar discussions on the legal personality of juristic persons, *Zahraa's* selective approach focused on the concepts that may constitute legal personality of juristic persons, including corporations.

## 2. Utilitarianism Approach and Juristic Legal Personality

*Zahraa* faced two main problems when dealing with legal personality of juristic persons: the lack of any classical discussions, and the lack of the legal personality concept. *Zahraa* adopted the utilitarianism approach to prove that the concept of *dhimma* is the attribute to legal personality. He adopted this approach on two levels. On the first level, *Zahraa* selected the legal capacity and *dhimma* concepts that are inherent in natural personality to follow their development to constitute the legal personality concept. He concluded that the concept of *'ahliyyat al-wujūb*, is the core issue of legal personality. And the concept of *dhimma* is the attribute to legal personality that is enjoyed by Islamic entities like the *waqf*. On the second level, *Zahraa* excluded the *Hanafi* opinion that denies that the *waqf* enjoys a separate *dhimma* than that of its administrator. In this part, the *dhimma* concept will be followed by the case of the *waqf*.

### 1. Legal Personality: *Dhimma*

*Al-'Ahliyyah* it is a capacity to qualify a person to become able to acquire rights, bear obligations and power to conduct actions and transactions that are able to produce their legal effects.<sup>113</sup> It is defined by *Al-Zarka* as "a description presumed in a person rendering such a person a possible candidate to receive a legislative injunction."<sup>114</sup> Additionally, *Al-Sabouni* defines it as "the ability of a person to oblige,

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<sup>113</sup> Nabil Saleh, *Definition and Formation of Contract Under Islamic Laws* ALQ, 101-111 (1990). According to Nabil, it is a capacity to qualify a person to become able to acquire rights, bear obligations and power to conduct actions and transactions that are able to produce their legal effects.

<sup>114</sup> AL-ZARKĀ, *supra* note 29, at.733. It is the translation of MAHMOUD M. SANUSI, THE CONCEPT OF ARTIFICIAL LEGAL ENTITY AND LIMITED LIABILITY IN ISLAMIC LAW 194, available at <http://www.google.com.eg/search?hl=en&biw=1003&bih=597&q=Mahmoud+M.+Sanusi%2C+The+Concept+of+Artificial+Legal+Entity+and+Limited+Liability+in+Islamic+Law%2C+Critical+Issues+on+Islamic+Banking%2C+Finance+%26+Takaful%2C+Article+10%3B&btnG=Search&aq=f&aqi=&aql=&oq=>

be obliged and conduct one's affairs by oneself."<sup>115</sup> Therefore, the concept of *al-ahliyyah* in Islamic law corresponds to the living status of a human being. It begins when a person is born alive and ends upon his death.

Legal capacity is composed of two concepts *'ahliyyat al-wujūb* and *'ahliyyat al-ada'*. The concept of *'ahliyyat al-wujūb* means "capacity to acquire rights and bear obligations."<sup>116</sup> The concept of *'ahliyyat al-ada'* means "capacity to conduct one's affairs by oneself."<sup>117</sup> Also, it is defined as "the ability of a person to initiate actions, the consideration of which depends on a sound mind."<sup>118</sup> *Al-Sabouni* defines it as the ability to effect actions that are recognized by Law.<sup>119</sup> The presence of a sound mind, comprehension and discernment are, therefore the main attributes of *Ahliyyat al-ada'*. Full *ahliyyat al-ada'* can be attributed to every human being upon attaining the age of maturity and satisfying its requirements.<sup>120</sup> Any person who lacks one of these qualities is presumed to have restricted *ahliyyat al-ada'*.

*Zahraa* detected the development of both concepts in classical Islamic law<sup>121</sup> when dealing with natural persons. The development is reflected in that sometimes both concepts coincide and sometimes they work separately.<sup>122</sup> *Zahraa* concluded two important points. The first point is that although both concepts are equally important, *'ahliyyat al-wujūb* is the core issue of legal personality." Therefore, "legal personality can exist without *'ahliyyat al-ada'*, but can under no circumstances exist without *'ahliyyat al-wujūb*."<sup>123</sup> The second notice is that the concept of *dhimma* coexists with the concept of *'ahliyyat al-wujūb*. *Zahraa* concluded that the concept of *dhimma* is the

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<sup>115</sup> MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, *AL-MADKHAL LI-DIRASAT AL-FIQH AL-ISLAMI* 2 at, 24 (Al-Maktaba'ah Al-Jadiih, 4th ed. 1978). It is translated by SANUSI, *supra* note 113.

<sup>116</sup> AL-ZARKĀ, *supra* note 28, at 733-741; MUSTAFAA AL-SIBA'IE & ABD AL-RAHMAN AL-SABOUNI, *supra* note 76, at 12-15. It is the translation of *Zahraa*. *Zahraa*, *supra* note 11, at 202.

<sup>117</sup> *Id.*

<sup>118</sup> AL-ZARKĀ, *supra* note 28, at 738. It is translated by SANUSI, *supra* note 114.

<sup>119</sup> AL-SABOUNI, *supra* note 114, at 31. It is translated by SANUSI, *supra* note 114.

<sup>120</sup> AL-ZARKĀ, *supra* note 29, at 772-78; and AL-SABOUNI, *supra* note 115, at 35. This means that he is attaining a sufficient level of mental and physical maturity or *al-rushd*. As a result, he becomes able to receive the *Shari'ah* injunctions and be accountable for actions involving obligations and use or abuse of rights.

<sup>121</sup> *Zahraa*, *supra* note 11, at 202.

<sup>122</sup> *Id.*

<sup>123</sup> ABD AL-RAZZAQ AL-SANHURI, *AL-WASEET FI SHARH AL-QANŪN AL-MADANI MASADER AL-LTIZAM* 220-221 (Dar 'hia' Al-Turath Al-'Arabi). He consider that the fetus that is born dead, the dead person after paying his debts, the group of people that do not enjoy legal personality, the slaves and the company after liquidation do not enjoy the concept of *'ahliyyat al-wujūb* and thus, have no legal personality.

attribute of legal personality.<sup>124</sup> Additionally, the definition of *dhimma* supported his argument.

*Dhimma* is generally defined as a presumed or imaginary repository or container that embraces all the financial and religious rights and obligations relating to a person in the present and future. *Al-Zarqa* presents *dhimma* "as a juristic container presumed in a person in order to encompass all its debts and obligations that are related to it."<sup>125</sup> *Al-Sanhouri* defines it as a "juristic (*shar'ie*) description that is presumed by the legislator to exist in a human being and according with which the person becomes able to oblige and be obliged."<sup>126</sup> This means that "the concept of *dhimma* represents that aspect of legal personality which is supposed to contain an account of all the person's rights and obligations whether they are religious or financial in nature."<sup>127</sup> It coexists with the legal personality since it starts when the person is born alive and ends when he dies.<sup>128</sup>

*Zahraa* proved that *dhimma* is the attribute to legal personality when he notices that Islamic scholars attribute the concept of *dhimma* to certain Islamic entities like *waqf*, *bayt al-mal*, schools, orphanages, hospitals, mosques, and other charitable institutions.<sup>129</sup> This notice is deducted from that unanimous opinion of classical Islamic scholars considers that these entities enjoy a separate *dhimma* from that of their administrators and employees. As a result, *Zahraa* concluded that these entities are juristic persons that enjoy legal personality. *Zahraa* discussed the Islamic entity of *waqf* as an example of Islamic entities that enjoy the concept of *dhimma*. Also, he adopted the selective approach in proving that the *waqf* enjoys the concept of *dhimma*.

## 2. The *Waqf*

*Zahraa* also adopted the selective approach when proving that the *waqf* enjoys the concept of *dhimma*. *Waqf* is "the act by which certain properties cease to be subject to

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<sup>124</sup> *Zahraa*, *supra* note 11, at 203.

<sup>125</sup> *AL-ZARKĀ*, *supra* note 29, at 738. It is the translation of *Zahraa*. *Zahraa*, *supra* note 11, at 203.

<sup>126</sup> *ABD AL-RAZZAQ AL-SANHURĪ*, *MASADER AL-HAQ FI AL-FIQH AL-ISLAMĪ* I at, 20 (1953). It is the translation of *Zahraa*. *Zahraa*, *supra* note 11, at 203.

<sup>127</sup> *Id.*

<sup>128</sup> *AL-SANHURĪ*, *MASADER AL-HAQ FI AL-FIQH AL-ISLAMĪ*, *supra* note 127, at 21; *AL-SABOUNĪ*, *supra* note 115, at 76-79.

<sup>129</sup> *LERRICK & MAIN*, *supra* note 121, at 106-107; *JOSEPH SCHACHT*, *AN INTRODUCTION TO ISLAMIC LAW* 125-126 (Clarendon Press 1964).

certain transactions...provided that their products, advantages, and benefits are devoted as a permanent charitable resource for the benefit of certain people or entities."<sup>130</sup> *Zahraa* focused mainly on that classical scholars discussed the *waqf* as having separate *dhimma* from that of its administrator. The administrator is working on behalf of the *waqf* as an agent on behalf of the *waqf* for the benefit of the beneficiaries.<sup>131</sup> And thus, his *dhimma* is involved only when his conduct leads to his liability.<sup>132</sup> Thus, the *waqf* has a separate *dhimma* from that of the administrator.<sup>133</sup>

*Zahraa's* selective approach focused on excluding the opinion of some *Hanafie* jurists that deny that the *waqf* has a separate *dhimma* from that of its administrator because it is contradictory. They consider that *dhimma* can only be attributed to the quality of human beings. However, they themselves allow the *waqf* to incur debts with the permission of the judge.<sup>134</sup> This is because the administrator can ask the judge to allow him to borrow money on behalf of the *waqf* in order to provide the necessary maintenance for the *waqf* properties. *Zahraa* concluded that such debt will be incurred in the *waqf dhimma* and not that of the administrator.<sup>135</sup> This means that the *waqf* enjoys a separate *dhimma* than that of the administrator.<sup>136</sup>

*Zahraa* meant to distinguish between the financial or juristic *dhimma* that is enjoyed by entities and the natural *dhimma* that is enjoyed by natural persons. The juristic *dhimma* is a restricted *dhimma* concept to the extent that it enables the administrators of such entities to implement their functions and perform their office. Otherwise, such entities will find immense obstacles in performing their rights and duties. This is different from the concept of human *dhimma* that is enjoyed by the administrator of the *waqf* because the administrator can enjoy religious rights and bear religious obligations. However, *Zahraa* did not deny the religious nature of the *waqf* as a charitable institution.

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<sup>130</sup> JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 247 (Graham and Trotman 1986).

<sup>131</sup> SHAMS AL-DIN AL-SARKHSI, *KITAB AL-MABSUT AL-MA'DHUN AL-KABIR* 12 at 27-47 (Dar Al-Ma'rifah); AL-NAWAWI, *supra* note 53, 15 at 360-366; SABEQ, *supra* note 17, 3at 528; MUHAMMAD AL-SHAWKANI, *NAIL AL-AWTAR, SHARH MUNTAHA AL-AKABAR* 6 at, 127-132; NASIR, *supra* note 134, at 251-252.

<sup>132</sup> AL-SARKHSI, *supra* note 132, at 31-39, 43-44; AL-NAWAWI, *supra* note 53, 15 at 360-366; AL-BAHAR AL-RA'AQ 5 at, 202, 212, 217, 227,228 (1993).

<sup>133</sup> IBN NAJEEM, *AL-BAHAR AL-RA'AQ* 5 at, 136 (1993).

<sup>134</sup> *Zahraa*, *supra* note 11, at 205.

<sup>135</sup> *Id.*

<sup>136</sup> AL-BAHOUTI *supra* note 19, at 270.

More importantly, *Zahraa* explained why the exceptional *Hanafie* view refused admitting that the *waqf* has a separate *dhimma*. He relied on two main reasons. The first reason concerns the definition of *dhimma*. These scholars were affected by the definition of *dhimma* that embraces financial and religious rights and obligations. Unlike human beings, entities can not enjoy religious rights and bear religious obligations. He concluded that although the *Hanafies* have been reluctant to define the financial rights and obligations of the *waqf* and other similar entities under the concept of human *dhimma*, these jurists are unanimous regarding giving these entities a separate set of financial rights and obligations.

The second reason concerns the historical context in which the classical jurists' argument was written. According to *Zahraa*, the classical jurists' arguments were at a time when Islamic entities including *waqf* were small and manageable by a single administrator. Therefore, there was no need to establish a legal person to perform all their transactions. Nowadays, the *waqf* and other charitable institutes are now so large. And it is impossible to manage such entities except by a legal person with a separate legal personality from its administrators.

The selective approach adopted by *Zahraa* in proving that Islamic law recognizes legal personality concept solved the problems that *Zahraa* faced in classical Islamic law to prove his argument. First of all, he relied on the discussions of scholars on the presumed legal status in of the fetus and the missing persons. Secondly, he selected the legal capacity and *dhimma* concepts to follow their development and conclude that the concept of *dhimma* is the attribute to legal personality. Also, he proved that Islamic entities enjoy the concept of *dhimma*. And thus, they enjoy legal personality.

## II. Liberal Religious Approach and Corporations

Kuran contends that "classical Islamic law recognizes only natural persons; it does not grant standing to corporations."<sup>137</sup> Not until the 19th century, the era of nationalist awakenings, corporations were generally powerful enough to prevail.<sup>138</sup> Kuran declares that Islam's call for community building that was meant to replace pre-Islam tribal system prevented the formation of other groups than that of the Islamic community during the formative period of Islam. This is although corporations need not have been invented from scratch since they were present in rudimentary forms in Roman law. After a few Islamic centuries, the call for community building was a main reason in the founding of the *waqf* that constituted a typical substitute for Western corporations. And a millennium later, although the effect of this call diminished, other reasons prevented the formation of corporations in the Middle East.<sup>139</sup>

This chapter is divided into two parts. In the first part, Kuran's liberal interpretation of Islam's call for community building is introduced. He considers that Islam's call for community building constitutes implicitly prevents the establishment of corporations in the Islamic East. Kuran's discussion on the establishment of corporations in the Christian West proves his argument due to the non existence of such call for community building. In addition, it proves that Islamic law refrained from importing corporations that existed in the West. In the second part, the introduction of unincorporated Islamic entities centuries after the advent of Islam and till modern times is introduced. Although the role of Islam's call for community building diminished, other reasons contributed in preventing various entities in the Islamic world from being corporations.

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<sup>137</sup> Kuran, *supra* note 1, at 794.

<sup>138</sup> *Id.*, at 829. The year 1851 witnessed the founding of the first predominantly Muslim-owned joint-stock company of the Ottoman Empire which is a marine transportation company. See Kuran, *supra* note 1, at 785-88.

<sup>139</sup> Kuran also explains why after Western Europe started to make increasing use of the corporation and to demonstrate its tangible advantages, this organizational form was not transplanted to the Middle East. This study does not focus in details to the development of Western corporations. See Kuran, *supra* note 1, at 803-12.



### **A. Liberal Approach and Community building**

Liberal religious approach liberates the texts from classical interpretations that are inconsistent with modern times. This requires the availability of certain texts in the main Islamic sources that deal with the topic in question. Corporations constitute a unique case due to the non existence of any texts that impose or prohibit the establishment of corporations. Accordingly, Kuran focused on finding out the *Qur'ānic* text that impeded the establishment of corporations in the Islamic East. He contends that the *qur'ānic* verse that calls for promoting community building implicitly prevented the establishment of corporations in the Islamic East. In contrast, the lack of this call in the Christian West led to the existence of corporations in the West. However, the Islamic East did not import such corporations. In this part, the liberal interpretation of Islam's call for community building will be followed by the establishment of corporations in the Christian West.

#### **1. Islam's Call For Community Building**

According to Kuran, in the formative period of Islamic law, Islam's call for community building aimed at performing two main targets. The first target is that it explicitly aims at replacing the pre-Islamic tribal system in the Arabian Peninsula. Pre-Islamic tribal system consisted of tribes bound together by fictitious blood. The responsibility of a person is undetermined since the individual was expected to support his tribesman. Intertribal unstable alliances formed for defensive purposes, and this promoted unending feuds. This resulted in insecurity and harm to wealth creation that constitutes the main initiative for economic and commercial relations. In response to this reality, this tribal system needed to be unified on certain bonds of solidarity other than decent.

Kuran considered that Islam achieved this unification when it adopted religion a stronger bond than decent.<sup>140</sup> The communal bond is an "ideological clue"<sup>141</sup>

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<sup>140</sup> Kuran, *supra* note 1, at 795.

<sup>141</sup> *Id.*

led to Islam's rapid diffusion in the whole world. In addition, it concluded in having one dominating group which is the *'ummah*.

Kuran introduces four notices that reflect Islam's communal bond in the Islamic community. The first notice is that the *Qur'ān* verses that impose the obligation of "commanding right and forbidding wrong" assign this obligation either to individuals or *'ummah*. "None imposes the duty on a subgroup of the community."<sup>142</sup> The second notice concerns the dual nature of Islam as a religion and law. This is represented in that the Prophet who was a religious and political leader and is represented in *Shari'a* that consists of *'ibadāt* or rituals and *mu'amalāt*.<sup>143</sup> The third notice is that Islamic legal interpretation is entrusted to individuals and not groups. The fourth notice is that in Islamic political theory, the world was divided into two territories, the abode of peace (*dar al-salam*) and the abode of war or (*dar al-harb*). This enhances the Islamic community building. However, Kuran included three practices that contradict with Islam's communal bond.<sup>144</sup>

The second target of Islam's call for community building introduced by Kuran is that it implicitly delayed the diffusion of corporations in the Middle East. This is attributed to the inherent fear of returning to the former tribal system through forming other personhoods. This fear explains the non development of some practices of legal persons. These practices include the practice of collective punishment for murder, collective responsibility for taxation, and the collective powers of minority communities. Additionally, this fear explains the omission of Muslims from including the concept of liability that may have facilitated factionalism.<sup>145</sup> In *mudaraba*, the most common form of Islamic partnership, the elements of limited liability is inherent. However, it was not developed to form a corporation.

The *qur'ānic* verse that calls for promoting community building is the third verse in *surat al-'imrān*. "Hold fast, all of you together, to the cable of Allah, and do not

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at performing internal and external purposes. With regard to internal purposes, it

<sup>143</sup> They are the two branches of Islamic law. *'Ibadāt* include the Islamic worships imposed on Muslims, such as prayer, fasting, and pilgrimage. Performing these worships means the ultimate obedience, submission, and humility to *Allah*, "God". *Mu'amalāt* include daily activities like trading, and relations between individuals like marriage.

<sup>144</sup> For foreigners outside the Islamic territory as evidenced by the early Islamic conquests. This practice relates to the extension of inheritance rights that were restricted to nuclear family to secondary relatives. The third practice concerns imposing sharp limits on testamentary freedoms. He added another practice in modern times when trade tariffs distinguished between Muslims and non Muslims.

<sup>145</sup> Kuran, *supra* note 1, at 795.

separate," says the *Qur'ān*. "And remember Allah's favor unto you: how you were enemies and ... you became brothers by His grace; and how you were upon the brink of an abyss of fire, and He saved you from it."<sup>146</sup> It is obvious that this verse does not impose the establishment of corporations on Muslims. Equally, it does not prevent the formation of corporations. It merely calls for unifying Muslims under the banner of Islam against the enemies of Islam. As a result, the solidarity of the Islamic community is maintained.

Kuran's liberal approach belongs to *qur'ānism*. It is an Islamic denomination that holds the *Qur'ān* to be the only recognized text in Islam.<sup>147</sup> Accordingly, *Qur'ānists*<sup>148</sup> interpret the *Qur'ān* through relying on the *Qur'ān* itself. In other words, "the *Qur'ān* interprets itself."<sup>149</sup> There is no need to rely on other sources of Islamic law like the *Sunnah* and *Hadith*, especially *hadith qudsi*.<sup>150</sup> The case of corporations constitutes an exceptional case due to the lack of any *Qur'ānic* text that imposes or prohibits the establishment of corporations. Accordingly, Kuran focused on finding out the *Qur'ānic* text that impeded the establishment of corporations in the Islamic East. In this case, the *Qur'ān* itself interprets the lack of texts that establish corporations, and consequently, the lack of related discussions in classical Islamic law.

The peculiarity of corporations' case lies in that the liberal religious approach was able to explain the non existence of corporations in classical Islamic law. Reinterpreting Islam's call for community building was the main tool since this call prevented the establishment of corporations in the Middle East. In contrast, the Christian West witnessed the gradual development of corporations due to the lack of Christianity call for community building. But some Roman rudimentary forms of corporations were formed. And although both systems coexisted, the Islamic East did not import such Western forms of corporations.

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<sup>146</sup> *Id.*

<sup>147</sup> See [http://www.ahl-alquran.com/arabic/show\\_article.php?main\\_id=346](http://www.ahl-alquran.com/arabic/show_article.php?main_id=346). *Ahmed Mansour* is one of the founders of this denomination in Egypt.

<sup>148</sup> They may be referred to as *qur'āniyyūn*, *qurāniyyūn*, *qur'āniyyūn* or *'ahl al-qur'ān*.

<sup>149</sup> This is contrary to the opinion of *Farag Foddah* that states that the "*Qur'ān* does not explain itself, and Islam does not apply itself, but it is done by Muslims who have done the worst to Islam." See FARAG FODDAH, AL-HAQIQAH AL-GHA'EBAH (Dar Al-Fikr).

<sup>150</sup> It is also called the sacred *hadith*. It is a subcategory of *hadith* that Muslims regard as the words of God repeated by Muhammad and recorded on the condition of an *'isnād*. See the methodology of *'ahl al-Qur'ān*. <http://www.ahl-alquran.com/arabic/terms.php#manhag>.

## 2. The Establishment of Corporations in the Christian West

Contrary to the Islam's call for community building, Kuran considers that Christianity contributed in the development of corporations through adopting the Christian injunction that states "to render to Caesar the things that are Caesar's, and to God the things that are God's."<sup>151</sup> Similar to Islam's call for community building, Kuran claims that this injunction has two interpretations. The first explicit interpretation requires the separation between the church and the strong Roman state. The second implicit interpretation requires that establishment of corporations. And thus, it provides the canonical basis for having other personhoods than that enjoyed by certain forms under the Roman state.

Kuran illustrates that pre-Christianity the centralized Roman state was already founded. The Roman state "was empowered to hold property and transact with natural individuals as though it was itself a person."<sup>152</sup> This state constitutes the first clue for the existence of the concept of collective entity<sup>153</sup> that reflects the Roman origin of corporations.<sup>154</sup> The second clue is collectively held Roman tax farms (*societas publicanorum*) that were organized as special partnerships. These partnerships "separated ownership from management, had representatives who acted for the company as a unit, and allowed the trading of their shares."<sup>155</sup> The third clue is the *Corpus Juris Civilis*. It is "the law code compiled during the reign of Justinian" that "allows the imperial treasury to sue and be sued in court."<sup>156</sup>

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<sup>151</sup> Kuran, *supra* note 1, at 796.

<sup>152</sup> ARTHUR K. KUHN, *THE LAW OF CORPORATIONS* 17-18 (1912).

<sup>153</sup> This concept developed under the Romans.

<sup>154</sup> Kuran, *supra* note 1, at 789-92.

<sup>155</sup> ULRIKE MALMENDIER, ROMAN SHARES, IN *THE ORIGINS OF VALUE: THE FINANCIAL INNOVATIONS THAT CREATED MODERN CAPITAL MARKETS* 32-40 (William N. Goetzmann & K. Geert Rouwenhorts eds., 2005); HERBERT F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 296-97 (3rd ed. 1972).

<sup>156</sup> However, Kuran showed that this law does not stipulate important characteristics of corporations. First, it does not articulate a precise definition of the corporation since it says nothing of identifying its rights and obligations in general terms. Second, it does not elucidate the relationship between the ensemble and its members. Third, it does not specify whether the collective rights enshrined in a corporation come from a public charter or the will of its founders. Fourth, the terminology used like *universitas*, *collegium*, *persona* in the code is unclear.

half-millennium diverse private associations<sup>157</sup> demanded and gained general recognition as corporations "in lands under the control of the Eastern Roman Empire and, more prominently, in former territories of the Western Roman Empire."<sup>158</sup>

The emergence of Christianity in strong state "made it focus on matters of faith, morality, and community, generally ignoring the challenges of economic and political organization."<sup>159</sup> As a result, early Christians followed pre-existing Roman law in their daily interactions. The second factor is the weakening of central authority following the demise of the Western Roman Empire. The consequent power vacuum provided incentives as well as opportunities to institute diverse private legal systems as a means of enhancing organizational efficiency. The resulting process of incorporation fed on itself as new corporations increased experience and familiarity with decentralized governance.

In addition, Kuran showed that the centuries of weak state authority in the Western Roman Empire coincide with the formative period of Islamic law. Nevertheless, the Islamic East that did not have to invent corporations from scratch refrained from importing these forms. He relied on three main historical events. The first event concerns the Prophet Muhammad who was born just six years after Justinian's death.<sup>160</sup> The second event relates to some of Islam's most celebrated early jurists who were contemporaries of Charlemagne.<sup>161</sup> The third event happened around the year 1000 concerning Islamic contract law. As this law "was assuming the classic form that would remain essentially unchanged for the next millennium, the West was continuing to experiment, in uncoordinated fashion, with the corporate form."<sup>162</sup>

Kuran introduced the Roman Catholic Church as the first formal corporations that emerged after the split of Christianity<sup>163</sup>

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<sup>157</sup> These associations include burial clubs, craft guilds, charitable societies, cults, churches, monasteries.

<sup>158</sup> This happened in lands under the control of the eastern Roman Empire and, more prominently, in former territories of the Western Roman Empire.

<sup>159</sup> Kuran, *supra* note 1, at 793.

<sup>160</sup> He is commonly known as Justinian the Great. He was Byzantine Emperor from 527 to 565. During his reign, Justinian sought to revive the Empire's greatness and re-conquer the lost Western half of the classical Roman Empire.

<sup>161</sup> He is also known as Charles the Great. He was King of the Franks from 768 and Emperor of the Romans from 800 to his death in 814. He expanded the Frankish kingdom into an empire that incorporated much of Western and Central Europe. During his reign, he conquered Italy and was crowned *Imperator Augustus* by Pope Leo III on 25 December 800 in Rome.

<sup>162</sup> Kuran, *supra* note 1, at 791.

<sup>163</sup> This happened in 1054.

religion from the control of emperors, kings, and feudal lords.<sup>164</sup> Additionally, this struggle gave rise to the new canon law (*jus novum*) of the Catholic Church. Canon law that dealt with a wide range of issues<sup>165</sup> emerged as a systematized body of law that was articulated in texts and supported by theories pertaining to the sources of law. In addition, "the clergy had developed a collective self-consciousness and formed effectively autonomous religious organizations."<sup>166</sup> This happened all across Western Europe during the incorporation wave of the sixth through eleventh centuries.<sup>167</sup> Just then, the church claimed a corporate identity of its own and sought to differentiate itself from the secular world.

Also he considers that the late 11th and 12th centuries witnessed the commercial revival of the incorporation movement in medieval Europe.<sup>168</sup> And "not until the late 16<sup>th</sup> century did commercial enterprises start getting organized as corporations."<sup>169</sup> Kuran describes this period as the period of organizational divergence in the Middle East and Western Europe.<sup>170</sup> Kuran wants to show that the Islamic East refrained from importing the Western forms of corporations. This concluded in having two systems. They are the Christian Western system that permitted the formation of corporations and the Islamic Eastern system that prohibited the establishment of corporations. However, the Islamic East witnessed the emergence of the *waqf* a few centuries after the advent of Islam because of Islam's call for community building and other reasons. And a millennium later, although the effect of this call diminished, other reasons prevented the formation of corporations in the Middle East.

### **B. Community Building and Islamic Entities**

Chronologically, as illustrated by Kuran, the effect of Islam's call for community building and during the struggle to emancipate in preventing the founding of corporations began to decline. A few centuries after the advent of Islam, Islam's call for community building contributed in introducing the *waqf* as an alternative to corporations and thus, prevented the formation of corporations in the Middle East. However, other reasons served in

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<sup>164</sup> This happened in (1075-1122).

<sup>165</sup> These issues include jurisdiction, property, and contracts. They are built on innumerable concepts, enactments, and rules that belong to the inherited secular and ecclesiastical legal systems.

<sup>166</sup> Kuran, *supra* note 1, at 791.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*, at 802.

<sup>169</sup> *Id.*

<sup>170</sup> This paper will not discuss in details the development of corporations in the Christian West.

supporting the *waqf*. After a millennium, the role of this call diminished. Nevertheless, other reasons contributed in preventing certain forms of collective entities that prevailed in the Islamic territories from being incorporated. In this part, the role of community building in introducing the *waqf* as an alternative to corporations is followed by its diminished role.

### **1. Community Building and the Waqf**

A few centuries after the advent of Islam, Islam's call for community building contributed in introducing the *waqf* as an alternative to corporations. According to Kuran, the *waqf* is an unincorporated trust<sup>171</sup> that constitutes an alternative Islamic organization to Western corporations. The main reason that Kuran introduced is that the *waqf* accords with Islam's communal vision that rejects the formation of corporations.<sup>172</sup> In addition, Kuran introduced three other reasons. The first reason is that the *waqf* served as a "vehicle for financing Islam as a society."<sup>173</sup> The second reason is that the *waqf* has some common characteristics with corporations. The third reason is that individuals, the owners of the *waqf* and rulers, were motivated to rely on *waqf*.

First of all, Muslims did not invent the *waqf* from scratch<sup>174</sup> since pre-Islamic peoples of the Middle East used the *waqf* in various forms. As a result, the selection of the *waqf* by Muslims accords with Islam's communal vision. The fear of Muslim leaders from factionalism made them favored "an institution established and directed by an individual to one involving self-governance by an organized group."<sup>175</sup> This represents the important role that Islam's call for community building performed a few centuries after the formative period of Islamic law. And this period represents the prosperity of this idea.

Secondly, the *waqf*'s financial powers are reflected in their capability of spreading "the huge start-up costs of providing certain durable social services"<sup>176</sup>

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<sup>171</sup> Kuran, *supra* note 1, at 799.

<sup>172</sup> *Id.*

<sup>173</sup> In Marshall Hodgson's words,

<sup>174</sup> The concept of a trust was present in Roman law. Kuran, *supra* note 1, at 800.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*, at 799.

mission when it contributed to the functioning of cities in the middle ages through financing the building and maintenance of innumerable urban services. The second point relates to the famous writings of *Ibn Battuta's* journeys through the Islamic world. He speaks of the various types of *waqfs* that were inside and outside cities. Inside cities, *waqfs* are "dedicated to providing drinking water, the paving of streets, assistance to travelers, the financing of pilgrimages, and wedding outfits to impoverished brides."<sup>177</sup> Outside cities, *waqfs* funded most of the fortified inns used by traveling merchants.

Thirdly, Kuran introduced two common characteristics of a *waqf* and a corporation.<sup>178</sup> The first characteristic is that like corporations, the *waqf* could be directed to fulfill specific needs.<sup>179</sup> The second characteristic that a *waqf* shares with a corporation is its capacity to protect its founder, employees, and beneficiaries. However, Kuran did not deny the existence of three major differences.<sup>180</sup> First, although the establishment of a corporation requires the collective will of its members, the founder of a *waqf* had to be an individual.<sup>181</sup> Second, whereas a corporation was supposed to be controlled by a changing membership, a *waqf* was meant to be permanently controlled by its founder through directions enunciated in the founding deed.<sup>182</sup> Third, although a corporation could remake its own rules, a *waqf's* rules of operation were meant to be fixed.<sup>183</sup>

Fourthly, Kuran focused on that individuals, the owners of the *waqf* and rulers, were motivated to rely on *waqf*.<sup>184</sup> Concerning the owners of the *waqf*, Kuran provided two common motives which were generosity and prestige.<sup>185</sup>

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<sup>177</sup> IBN BATTUTA, THE TRAVELS OF IBN BATTUTA 1 at, 64-65, 148-49 (Hamilton A.R. Gibb ed., 1958); IBN BATTUTA, THE TRAVELS OF IBN BATTUTA 2 at, 450 (Hamilton A.R. Gibb ed., 1962).

<sup>178</sup> Kuran, *supra* note 1, at 800.  
<sup>179</sup> *Id.*, at 799.

<sup>180</sup> *Id.*, at 800.  
<sup>181</sup> *Id.*

<sup>182</sup> *Id.* Accordingly, a *waqf's* mission was irrevocable meaning that not even its founder was authorized to alter its declared purpose retroactively.

<sup>183</sup> *Id.* If the instructions are determined by the founder, they were enforced through the judge. And if the deed was silent, they were to be enforced according to local custom.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*



manager-trustee (*waqf's mutawalli*) in order to set his own salary, hire relatives to paid positions, and even designate his successor. This is a method to bypass Islam's inheritance regulations. In addition, "in endowing assets as *waqf*, a founder also made them more secure."<sup>186</sup> The *waqf* served as a wealth shelter. This is because rulers were prone to confiscate *waqf* assets since the *waqf* was presumed sacredness. So that rulers had much to lose by appearing impious.

With regard to rulers, they gave up their expropriation opportunities since "the founder commit credibly to supplying his chosen social services"<sup>187</sup> through constraining him to follow the *waqf* deed. This commitment is based on the "static perpetuity" principle of the *waqf* since its establishment. Kuran considered this principle "as part of an implicit social bargain between rulers and the owners of private property."<sup>188</sup> This principle prevented any modifications instituted to enable pressing changes. This was supported by the inflexible designation of *waqfs* for mitigating the agency problem inherent in delegating the implementation of the founder's instructions to successive individuals in order to divert assets to their own uses. However, the flexibility was strictly limited since a *waqf* contained a list of allowable operational modifications.

Following the advent of Islam, it is obvious that Islam's communal vision played a major role in making the *waqf* an alternative to corporations. In addition, other reasons concerning the financial nature of the *waqf*, its common characteristics with corporations, and the motivation of individuals towards it contributed in performing this mission. But after a millennium, the role of Islam's call for community building diminished. However, different reasons supplied the adoption of the Islamic model of corporations and additional family. This is because the founder could appointive self titles that prevailed in the Islamic territories from being incorporated.

## 2. Community Building and Corporations

After a millennium from the advent of Islam, the decline of the role of Islam's call for community building took place. This is because Kuran identified certain chains of causation, other than Islam's communal vision, that led to the stagnation of business

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*, at 801.

<sup>188</sup> *Id.*

organizations in the Middle East and prevented them from being incorporated. The first chain concerns "missed Middle Eastern opportunities"<sup>189</sup> the centuries following the advent of Islam. The second chain relates to the "lack of demand for organizational innovation."<sup>190</sup> The third chain concerns "structural stagnation of the *waqf*."<sup>191</sup> The fourth chain focuses on the groups treated by the state as administrative units for taxation that did not give rise to the corporation.<sup>192</sup> The fifth chain is the limited autonomy of minority groups.<sup>193</sup>

First of all, Kuran provided two missed Middle Eastern opportunities centuries after the advent of Islam that may have led to the establishment of corporations in the East.<sup>194</sup> The first opportunity concerns the existence of more or less autonomous Muslim sub-communities which conflicted with the ideal of undifferentiated communal unity.<sup>195</sup> The second opportunity relates to "the organizational development of the traders who dominated trade between the Middle East and the West."<sup>196</sup> Although Kuran failed to provide the reason that led Muslims missed these opportunities, at the same time, these opportunities reflect the decline of the Islam's call for community building role in preserving the solidarity of the Muslim community.

Concerning the first opportunity, Kuran focused on the reason for adopting these sub-communities, the different forms of sub-communities, and the reasons that made jurists and politicians deny their adoption. First, Kuran considered that in theory, the exigencies of daily life constitute the main reason for asserting "a group identity less inclusive than that of the full religious community."<sup>197</sup> This is especially performed in Egypt, Syria, and Iraq by the end of the seventh century.<sup>198</sup>

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<sup>189</sup> *Id.*, at 811.

<sup>190</sup> *Id.*, at 815.

<sup>191</sup> *Id.*, at 819.

<sup>192</sup> *Id.*, at 823.

<sup>193</sup> *Id.*, at 828.

<sup>194</sup> *Id.*, at 811-15.

<sup>195</sup> *Id.*, at 813.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*, at 812.

<sup>198</sup> *Id.*

was limited to local matters.<sup>199</sup> This permitted the fragmentation of the community into subdivisions and subgroups that enjoy a measure of self-governance.

Second, Kuran numerated the different forms took by Sub-communities.<sup>200</sup> "They appeared through political divisions and rivalries."<sup>201</sup> The Muslim community split into conflicting sects like the Sunni-Shiite division. Also, converts maintained tribal, ethnic, linguistic, and geographic loyalties.<sup>202</sup> Additionally, movements arose to obtain a privileged status for Arab Muslims especially for Muhammad's descendants, along with counter-movements defending the rights of non-Arabs. And every Muslim empire has featured one or more politically dominant ethnic group, along with minorities dominant in one economic sector or another.<sup>203</sup> Finally, "after Muhammad no Muslim sovereign enjoyed legitimacy throughout the global community of Muslims."<sup>204</sup>

Third, Kuran provided the reason that made jurists and politicians deny the legitimacy of sub-communities. Their intention to abide to the ideal of a unified community that would lead to withholding legal rights from sub-communities was their reason for denial.<sup>205</sup> However, Kuran provided that sub-communities did not need this legitimacy and that these objections may have led to the development of movements to enforce states embrace corporations as a useful sub group.<sup>206</sup> It is obvious that according to Kuran, Muslim Middle East witnessed the opportunity of having sub-communities, but they did not develop to form corporations.

Besides the existed sub-communities within the Middle Eastern community, the second opportunity that Kuran introduced relates to opportunity of having development of organizations in the West that could be imported through different groups of people. These groups include Western traders who visited and settled in Muslim-governed commercial centers, pilgrims to the holy sites of Christianity and Judaism. They also include incorporated groups, such as the Hospitallers, that participated in the Crusades as both fighters and providers of charity. Most

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*, at 813.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

importantly, overseas trading companies are included in these groups through their relations with Middle Eastern merchants, financiers, customs officials, and judges. Kuran concluded that Islamic Middle East might have learned about these groups without going far and the Middle Eastern community might have witnessed an incorporation movement.<sup>207</sup>

Kuran noticed the lack of pertinent records on how Middle Eastern merchants viewed the overseas trading companies.<sup>208</sup> Kuran provided two possible explanations and refuted them.<sup>209</sup> The first explanation considers that Islamic law was frozen by closing the gate of innovation (*ijtihad*). He refuted it when he distinguished between Islam in principle that was fixed and Islam in practice that was flexible in certain cases like when the tax system was changed by decree "and with only the flimsiest basis in Islamic law."<sup>210</sup> The second reason provides that "the prevailing legal ethos made it impossible to accommodate fictitious persons without challenging the very core of Islam."<sup>211</sup> He refuted this explanation through relying on the found precedents for rudimentary forms of legal personhood in Islamic legal history like the property that can legitimately be donated to a mosque according to certain early jurists.<sup>212</sup>

In addition to the missed Middle Eastern opportunities, Kuran provided the lack of Demand for organizational innovation in the Islamic court system.<sup>213</sup> According to Kuran, this is attributed to "Islam's relatively egalitarian inheritance system stands out as a key source of unintended organizational stagnation."<sup>214</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*, at 815.

<sup>209</sup> See RICHARD C. REPP, QANUN AND SHARI'A IN THE OTTOMAN CONTEXT, IN ISLAMIC LAW: SOCIAL AND HISTORICAL CONTEXTS 124-45 (Aziz al-Azmeh ed., 1988); SAMI ZUBAIDA, LAW AND POWER IN THE ISLAMIC WORLD 3 (2003); COLIN IMBER, EBU'S-SU'UD: THE ISLAMIC LEGAL TRADITION 2, 5-6 (1997).

<sup>211</sup> Kuran, *supra* note 1, at 815.

<sup>212</sup> *Id.* Kuran declared that these jurists belonged to the *Shafi'i* and *Maliki* schools of law.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*, at 816.

duration of their partnerships."<sup>215</sup> In addition, the Islamic inheritance system would also have fragmented the estates of successful merchants, hindering the preservation of their businesses across generations.<sup>216</sup>

Structural Stagnation of the *Waqf* constitutes the third chain of causation for the stagnation of Islamic organizations. Kuran identified four key differences between the *waqf* and the business corporation. "First, the *waqf* is not a profit-maximizing entity. Second, an individual's share of a *waqf's* income is not transferable. Third, no clear separation exists between the property of a *waqf* and that of its *mutawalli*. Finally, the *waqf* lacks legal personhood."<sup>217</sup> According to him, although these differences could have been ignored to meet corporate characteristics, this did not happen and resulted in the structural stagnation of the *waqf*.

First, Kuran considered that the *waqf* as a vehicle for providing social services through the "immobilization" of wealth from the eighth century onward.<sup>218</sup> Immobilization precluded profit maximization in a manner similar to that of business corporations. As a result, a compromise had to be performed between maximization its profit and maximizing its capacity to deliver services. The *mutawalli* did not extend his discretion in order to improve his ability to exploit *waqf* resources because the state had a stake in the stability of *waqfs* since state's legitimacy depended on *waqf* in delivering services. And also, the state feared the increased risks taken with *waqf* assets when boosting profitability.

An Islamic partnership is voided by the death of a partner and the costs of liquidation depend on the number of heirs. Dividing the estates among numerous heirs according to the Islamic inheritance system raises the costs of liquidating a partnership prematurely. As a result, merchants and investors tent to "minimize risk of premature liquidation by limiting the size and transferability of *waqfs*" shares is that it "would weaken the connection between intended and actual uses of the founder's resources."<sup>219</sup> And "if the transfer involved a payment, it would also cross the line between charity and commerce."<sup>220</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*, at 819.

<sup>218</sup> *Id.*, at 820.

<sup>219</sup> *Id.*, at 822.

<sup>220</sup> *Id.*

Third, Kuran considers that the *waqf* does not enjoy legal personhood and thus, no clear separation exists between the property of a *waqf* and that of its *mutawalli*.<sup>221</sup> The *mutawalli* of any *waqf* bore personal liability for actions taken in fulfilling his duties since he was the one to be sued. "There was no clear demarcation between assets of the *waqf* and those of its *mutawalli*."<sup>222</sup> Kuran provided two reasons for this.<sup>223</sup> The first reason is that the courts when adjudicating disputes involving the *mutawalli's* exercise of his fiduciary duties mitigated the consequent risks of serving as *mutawalli*. The second reason is that *Qadis* usually obtained the expected payment for their support to the organizational status quo. This judicial system required supportive judicial reforms to witness transition to legal personhood.

Fourthly, Kuran provides certain groups that although the state treated as administrative units for taxation, these groups did not give rise to the corporation.<sup>224</sup> These groups are craft guilds and tax farms. According to Kuran, the Middle Eastern States might have found it advantageous to help the business community develop larger, longer-lived, and more complex organizations.<sup>225</sup> The simplicity of these forms will provide incentives and opportunities for individuals to establish corporations that seek profits. However, Kuran considered that these groups did not give rise to corporations because they enjoy certain characteristics that are odd from corporations.<sup>226</sup> And "if the corporate form of organization was to emerge through indigenous means, guilds or tax farms might have provided the starting point."<sup>227</sup>

First, Kuran considered that the craft guilds that emerged around the 15th century departed from corporation because of three main characteristics.<sup>228</sup>

This is

contrary to incorporations that require the transferability of their shares.

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*, at 823.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*, at 824.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*, at 824-25.

from acquiring more autonomy over time.<sup>229</sup> Consequently, Kuran concluded that generally, the craft guilds did not give rise to corporations and he described them as unincorporated craft guilds.<sup>230</sup>

The first characteristic of the craft guilds that Kuran introduced is that Guilds could outlive their members.<sup>231</sup> Although guild leaders are recommended by the membership, they were appointed by the state. But in practice, many guilds enjoyed substantial autonomy in the selection process since the membership can dismiss a leader who failed to live up to expectations. Additionally, the state does not prevail when conflicts erupted between the guild and the state. However, leaders are chosen directly by the government in guilds that produced politically sensitive goods in places critical to political stability, usually from among military officers loyal to the sultan. Therefore, guild leaders had to serve the interests of two masters at once: the interests of the ruler, and that of membership. The guilds were not organizations capable of taking actions seriously independently from state demands. "They enjoyed self-rule only insofar as the state considered it helpful to revenue generation or harmless to political stability."<sup>232</sup>

The second characteristic of the craft guilds that Kuran introduced involves dispute resolution.<sup>233</sup> In order to solve their internal problems, guild leaders and members often went to state-appointed officials outside the guild system. This characteristic affects their independence. The third characteristic is that the guilds lacked significant assets of their own. This is because guildsmen owned or rented their shops as individuals. And although some guilds formed common funds to provide mutual insurance, they seem small.<sup>234</sup> However, Kuran provided that at the time of their emergence, certain political conditions prevented the guilds from acquiring autonomy.<sup>235</sup> The first characteristic is that Guilds could outlive their members. The second characteristic is that they refer to state-appointed officials outside the guild system for dispute resolution. The third characteristic is that the guilds lacked significant assets of their own. However, Kuran referred to certain political conditions that prevented the guilds

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<sup>229</sup> *Id.*, at 825-26.

<sup>230</sup> *Id.*, at 825.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> The largest common fund noted in the most detailed study of Istanbul's guilds in the 17th century is that of the city's cauldron makers. In 1640, the fund held 76,000 aspers, which amounted to what a skilled construction worker would make in eight years. Hence, the fund's assets were too limited to support even a single disabled member for a decade.

<sup>235</sup> Kuran, *supra* note 1, at 825-26.

But the Ottoman state saw no reason to grant the guilds legal personhood in order to manage their resources centrally and direct their operations at will.

Second, Kuran considered that the tax farms departed from corporations.<sup>236</sup> This is attributed to that from the start, "tax farming served as an instrument of state power rather than of collective empowerment on the part of sub communities."<sup>237</sup> The state tended to watch for signs of collective action liable to weaken its control over revenue streams. This is reflected in the state's dominance in forming the tax farms instead of tax constituencies. In addition, the state was free to alter their boundaries and to switch to direct taxation through salaried officials where the transaction costs of direct collection were exceptionally high. Also, "a state-created tax constituency could develop a common identity conducive to collective opposition."<sup>238</sup> In response, successive sultans kept the tax farm period short enough to enable frequent rotation among tax farmers; depending on the sector, the term was one to twelve years. They also adjusted farm boundaries and suppressed tax farmers showing signs of acquiring a political base.

According to Kuran, the most important issue that the state focused on is to keep the tax farm period short enough.<sup>239</sup> This is because "the longer the tax farm period, the greater the bids of potential tax farmers."<sup>240</sup> And thus, the probability of having tax farmers of political autonomy is possible as the period is lengthened. This happened when the Ottoman state tended to lengthen the period of tax farms when it faced a risk-return tradeoff in 1695 "in the face of mounting budget deficits and an impending military defeat."<sup>241</sup> Since the required amount for purchasing a tax farm was higher, "Ottoman tax farmers steadily gained political clout and began claiming the right to bequeath farms to their descendants."<sup>242</sup>

This happened when Anatolia was in turmoil that continued for too long. Kuran focused on three main characteristics that developed in tax farms and that may have led them to be corporation.<sup>243</sup>

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<sup>236</sup> *Id.*, at 826.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*, at 826-27.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*, at 827.

<sup>243</sup> This was part of a process of organizational renovation.



for the duration of the farm, possibly decades"<sup>244</sup> in order to meet the payments required to win auctions. The second characteristic is the transferability of shares in order to give certain partners the opportunity to withdraw from established tax farms.<sup>245</sup> The first characteristic is the managerial rotation system. This was performed when partners started taking turns as managers and thus, changing owners "lifetime ownership."<sup>246</sup> Kuran concluded that "tax farmers might have formed the first corporations of the Islamic Middle East."<sup>247</sup>

Finally, Kuran considers religious minority groups failed to meet the requirement of corporations.<sup>248</sup> These communities were already organized at the dawn of Islam and they possessed collective identities. "Under Islamic rule, successive regimes pursued policies that preserved communal distinctions."<sup>249</sup> Kuran provided certain manifestations.<sup>250</sup> First, "in Islamic courts a non-Muslim litigant was almost always identified as a member of his religious community."<sup>251</sup> Second, "a Christian or Jew was also required to wear clothes intended to mark him off as a member of a community with distinct rights and responsibilities."<sup>252</sup> Third, "Muslim rulers granted internal autonomy to Christian and Jewish communities, but only insofar as this was convenient. Whereas minorities were free to adjudicate internal civil lawsuits on their own, the Islamic courts had sole jurisdiction over all criminal cases."<sup>253</sup>

Kuran provides that the main reason that prevented these groups from developing the corporation within non-Muslims communities lies in that "non-Muslim interactions with Muslims thus took place within an Islamic institutional framework."<sup>254</sup> This happens when non-Muslims choose to seek Islamic legal systems<sup>255</sup>

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<sup>244</sup> Kuran, *supra* note 1, at 827.

<sup>245</sup> This innovation involved management.

<sup>246</sup> Kuran, *supra* note 1, at 827.

<sup>247</sup> *Id.*, at 827.

<sup>248</sup> *Id.*, at 828. See generally, CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE 2 (Benjamin Braude & Bernard Lewis eds., 1982).

<sup>249</sup> Kuran, *supra* note 1, at 828.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*, at 829.

<sup>254</sup> *Id.*

<sup>255</sup> They have the right to adjudicate disputes outside the Islamic legal system.

autonomy."<sup>256</sup> Also, this happens in "civil cases involving at least one Muslim had to be tried by Muslim judges."<sup>257</sup> Kuran concluded that "the very mechanism that kept Muslims from developing the corporation constrained institutional evolution also within non-Muslim communities."<sup>258</sup>

In addition, Kuran provides that the taxation of minorities represents state policies for organizational development.<sup>259</sup> "Over the ages, sultans often found it advantageous to relegate tax collection to a communal leader."<sup>260</sup> He was frequently a religious authority for Jewish and Christian communities, and tribal Muslim communities who would negotiate a tax for his "contribution unit."<sup>261</sup> He acted as a double agent. On one hand, "in negotiating with the sovereign state, he would often seek to minimize his community's tax burden through tricks such as doctoring birth registers and understating production capacity."<sup>262</sup> On the other hand, when results were unsatisfactory, "rulers tried to co-opt communal leaders to serve as state agents" otherwise, "they would alter the tax collection policy, having their officials collect directly from community members."<sup>263</sup> Consequently, Kuran inferred that "the state would have resisted any move to assert genuine corporate power on behalf of religious minorities."<sup>264</sup>

Kuran's liberal interpretation to Islam's call for community building solved the dilemma of the non existence of corporations as legal persons in Islamic law. Islam's communal vision was not meant only to replace pre-Islam tribal system. But it was meant to implicitly prevent the formation of other personhood than the Islamic community. Its impact appeared a few centuries after the advent of Islam as it prevented the establishment of corporations in the Middle East. It did not contribute in introducing the Islamic alternative to capitalism. However, a millennium later, although the effect of Islam's communal vision diminished, other reasons led to the stagnation of the Middle Eastern organizations. It is obvious that

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<sup>256</sup> Kuran, *supra* note 1, at 829.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* This was performed in the Ottoman Empire.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

contrary to *Zahraa*, Kuran does not rely on classical Islamic law in order to prove his argument. This requires comparing between both of them in their effect on the content and organization of classical Islamic law.

### **III. Comparing Between Both Approaches: Their Effect on Classical Islamic Law**

The Comparison between utilitarianism and liberal religious approaches that is represented in *Zahraa* and Kuran in the case of corporations is important since it shows the effect of both approaches on the classical Islamic law. This comparison concludes that while utilitarianism religious approach perceives a distorting method to the classical Islamic writings in order to prove that Islamic law recognizes corporations, liberal religious approach perceives a protecting method to the classical Islamic writings even if it proves that Islamic law does not recognize corporations. The comparison focuses on the effect of each approach on the content and the structure of the classical Islamic law.

This part is divided into two parts. In the first part, the effect of both approaches on the content of the classical Islamic law is introduced. Utilitarianism approach distorts the classical content since it introduces an inconsistent Islamic legal system that disregards the divergent theological and legal bases of each Islamic school. But liberal approach protects the classical content since it introduces a modern consistent legal system. In the second part, the effect of both approaches on the structure of the classical Islamic law is introduced. Utilitarianism approach distorts the classical Islamic law through inverting the classical structure that is based on typology to be based on concepts. But liberal approach protects the classical law through accepting the classical structure and establishing a parallel legal system that organizes Islamic entities. In this part, the effect of both approaches on the classical content will be followed by their effect on the classical structure.

## A. The Content of Classical Islamic Law

*Zahraa's* and Kuran's approaches vary in their effect on the content of classical Islamic law. On one hand, *Zahraa's* utilitarianism approach introduces an inconsistent Islamic legal system based on a hodgepodge of Islamic opinions and concepts of different Islamic schools disregarding the divergent legal bases of each school. In addition, it reinterpreted the concepts applied to natural persons to Islamic entities. And finally, it introduces two types of legal personalities. On the other hand, Kuran's liberal approach introduces a modern consistent legal system for legal personality. This modern system respects the peculiarity of the classical Islamic law that focuses on human beings and does not give this importance to entities. The devastating effect of *Zahraa's* approach on the content of classical Islamic law will be followed by the protective effect of Kuran's approach.

### 1. *Zahraa* and Inconsistency

Classical Islamic law represents a tree<sup>265</sup> that has four roots two branches. These roots that constitute the main sources of classical Islamic law are the *Qur'ān*, the *Sunnah* and *Hadith*, *Qiyās* or analogy, and '*Ijma'* or consensus. The Islamic jurists followed these sources consecutively to reach the solution of a certain Islamic problem. This solution relates to one of the two branches. The two branches are *mu'amalāt* and '*ibadāt*. They constitute the two main categories of Islamic law. '*Ibadāt* include the Islamic worships imposed on Muslims such as prayer, fasting, and pilgrimage. Performing these worships means the ultimate obedience, submission, and humility to God. *Mu'amalāt* include daily activities like trading and relations between individuals like marriage.

In the case of legal personality, primarily, the only discussions in classical Islamic law relate to natural persons and specifically, declaring the presumed legal status of the fetus and the missing persons. It is obvious that the main Islamic source for this declaration is the consensus of Islamic scholars. This consensus constitutes the root of the tree. Secondly, the fetus and the missing persons' relatives enjoy certain rights and yet bear other obligations that constitute the trunk of the tree. Thirdly, they enjoy the

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<sup>265</sup> Paroline Gianluca in his lectures on Islamic Law Reform, Fall 2009.

concepts of *'ahliyyat al-wujūb* and *dhimma*. These concepts are attributes to human beings since the concepts of *'ahliyyat al-wujūb* is enjoyed by human beings and the concept of *dhimma* includes financial and religious rights and obligations. These concepts constitute the leaves of the tree.

But the modern Islamic legal personality that *Zahraa's* utilitarianism approach represents water hyacinths. Water hyacinth is a free-floating perennial aquatic plant that has broad, thick, glossy, ovate leaves that float above the water surface and has long, spongy and bulbous stalks that are under the water. Similarly, *Zahraa* proposed a modern legal system for legal personality that has detached roots from the Islamic soil, and has only one branch related to *mu'amalāt*. The detached roots allow this law from moving freely from one legal school to the other and selecting the most appropriate opinions to a certain modern problem. This means that modern Islamic law has no loyalty to any Islamic school of law. The only loyalty it has is towards the interest of public's interests or welfare.

This is well represented in *Zahraa's* utilitarianism approach. First of all, the main bases on which *Zahraa's* argument relied on are the discussions of classical Islamic scholars on natural persons due to the lack of similar discussions on the concept of legal personality in Islamic law. These discussions constitute the detached roots on which *Zahraa* relied on. Therefore, *Zahraa* selected the opinions of scholars that declare the presumed living status of the fetus and the presumed death of the missing persons and disregarded the other contradicting opinions. *Zahraa* assumed that presuming the legal status of natural persons reflects the capability of presuming the legal status of legal persons.

Secondly, *Zahraa* reinterpreted the Islamic concepts of *'ahliyyat al-wujūb* and *dhimma* that are the attributes of human beings to form the legal personality of Islamic entities. These interpreted concepts constitute the trunk of the tree. *Zahraa* selected from the definitions of both elements the characteristics that can be applied to Islamic entities and disregarded those that are applied to natural persons. Concerning the legal capacity concept, although the element of *'ahliyyat al-wujūb* can be equally enjoyed by natural persons and entities, the element of *'ahliyyat al-adā'* is limited to natural persons. Concerning the concept of *dhimma*, *Zahraa* selected the financial rights and obligations that can be equally enjoyed by natural persons and entities, and ignored

the religious ones that are limited to natural persons. This concluded in having two types of *dhimma*: the natural and financial *dhimma*.

Thirdly, this resulted in having two legal persons: the natural and juristic legal persons in Islamic law. These two types of personalities represent the leaves of the plant. This disregards the idea of *mukallaf* in Islamic law. The "*mukallaf* is the one who is pubescent, sane, and has received the message of Islam. Pubescence happens when one reaches the age of fifteen (15) lunar years, or otherwise. The sane person is the one who has not lost one's mind."<sup>266</sup> This means that the only person who is addressed by Islamic law is a natural person. But according to *Zahraa* the person may be a natural or a juristic person.

This approach permitted the introduction of another opinion<sup>267</sup> that contradicts with *Zahraa's* proposal. This opinion relies on the same concepts introduced by *Zahraa* which are the concepts of legal capacity and *dhimma*. However, it seems that they are satisfied with the concepts of '*ahliyyat al-'ada*' and *dhimma* to form the legal personality concept. This reflects the dilemma in relying on utilitarianism approach when there are no texts which is the possibility of having different interpretations to the same concepts when applied to other forms than the original form. These scholars introduced different Islamic forms and considered them as legal persons. These forms are joint stock, inheritance under debt, and the limited liability of the master of a slave.<sup>268</sup>

First of all, under the principle of "*Khultah-al-Shuyu*,"<sup>269</sup> the jurisprudence of *Imam Shaf'i* and that of the *Maliki* and *Hanbali* schools introduces two cases that are close to juridical person.<sup>270</sup> The first case is that of *Imam Shaf'i* that this opinion considers a joint stock company. Accordingly, "if more than one person run their business in partner-ship, where their assets are mixed with each other, the zakah will be levied on each of them individually, but it will be payable on their joint-stock as a whole, so much so that even if one of them does not own the amount of the nisab, but the combined value of the total assets exceeds the prescribed limit of the nisab, zakah

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<sup>266</sup> Available at [http://www.sunna.info/Lessons/islam\\_377.html](http://www.sunna.info/Lessons/islam_377.html).

<sup>267</sup> MUFTI MOHAMMED TAQI USMANI, AN INTRODUCTION TO ISLAMIC FINANCE, *available at* <http://www.archive.org/details/AnIntroductionToIslamicFinanceByShaykhMuftiTaqiUsmani>.

<sup>268</sup> *Id.*, at 156-60. He added the *waqf* and *bait al-māl*. These two forms will not be discussed since they do not contradict with *Zahraa's* argument. *Id.*, at 154-56.

<sup>269</sup> It means the case of mixing money or livestock together.

<sup>270</sup> "Juridical person" is used interchangeably with the "juristic person."

will be payable on the whole joint-stock including the share of the former, and thus the person whose share is less than the nisab shall also contribute to the levy in proportion to his ownership in the total assets, whereas he was not subject to the levy of zakah, had it been levied on each person in his individual capacity."<sup>271</sup>

And according to the *Maliki* and *Hanbali* schools, the same principle is applied on the levy of *zakah* on the livestock. Accordingly, if a person sometimes has to pay more *zakah* than he was liable to in his individual capacity, and sometimes he has to pay less than that, the separate assets should not be joined together and the joint assets should be separated in order to reduce the amount of *zakah* levied on them. Accordingly, this opinion considers the joint stock in this case a separate entity since it is treated as an entity that is obligated to pay the levy.<sup>272</sup>

"Inheritance under debt" is the second example introduced by this opinion. It concerns "the property left by a deceased person whose liabilities exceed the value of all the property left by him."<sup>273</sup> According to this opinion, inheritance under debt is considered an entity because it is not owned by any related individuals although they have their claims over it. First, it is not owned by the deceased because he is no more alive. Second, it is not owned by his heirs since "the debts on the deceased have a preferential right over the property as compared to the rights of the heirs."<sup>274</sup> Third, "it is not even owned by the creditors, because the settlement has not yet taken place."<sup>275</sup> The heirs of the deceased or his nominated executor will only look after the property as managers. "If the process of the settlement of debt requires some expenses, the same will be met by the property itself."<sup>276</sup>

The limited liability of the master of a slave is the third example introduced by this opinion. This opinion considers that the concept of limited liability is a definite result on enjoying the juristic personality. Accordingly, this opinion considers the limited liability of the master of a slave the closest example to the limited liability of a joint-stock company.<sup>277</sup>

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<sup>271</sup> USMANI, *supra* note 267, at 156-57.

<sup>272</sup> *Id.*, at 157.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*, at 158.

<sup>277</sup> *Id.*

two kinds of slaves<sup>278</sup> which was called *al-'abd al-ma'dhūn*. Accordingly, this relation passes through two main phases. In the first phase, the slave was free to enter into all the commercial transactions by the initial capital for the purpose of trade that was given to such a slave by his master. This capital is totally owned by the master and the income and "whatever the slave earned would go to the master as his exclusive property."<sup>279</sup>

In the second phase, the slave incurred debts in the course of trade. In this case, the debts will be set off "by the cash and the stock present in the hands of the slave."<sup>280</sup> This is unless the amount of such cash and stock is not sufficient to set off the debts, just then "the creditors had a right to sell the slave and settle their claims out of his price."<sup>281</sup> "However, if their claims would not be satisfied even after selling the slave, and the slave would die in that state of indebtedness, the creditors could not approach his master for the rest of their claims."<sup>282</sup> The liability of the master was limited to the capital he invested including the value of the slave. After the death of the slave, the creditors could not have a claim over the personal assets of the master.

It is obvious in these three cases that they enjoy the concept of '*ahliyyat al-'ada*' and a separate financial *dhimma*. In the first case, although the joint stock or the levy of the *zakah* acts on its own, it is not liable to pay the *zakah*. Only the amount of *zakah* will be determined according to the assets of the joint stock. In the second case, Inheritance under debt acts on its own only to settle all the obligations. But it can not acquire rights or bear obligations. In the third case, the slave as a human being enjoys the concepts of *dhimma* and '*ahliyyat al-'ada*'. However, the slave does not enjoy the concept of '*ahliyyat al-wujūb*' since he or she does not have the capacity to acquire rights and bear obligations.

*Zahraa's* approach ruined the classical content that is represented in the tree. He provides another content that is more related to water hyacinths that floats on the surface of the water. ~~The slaves detached from the master. But the debt is liberaf~~ approach provides a consistent legal system for legal personality that is completely

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<sup>278</sup> The second kind is called the *qinn*. *Id*, at 159.

<sup>279</sup> *Id*.

<sup>280</sup> *Id*.

<sup>281</sup> *Id*.

<sup>282</sup> *Id*.



independent from the classical one. Kuran focuses on reinterpreting the main sources of Islamic law instead of reinterpreting the classical scholars' interpretations.

## 2. Kuran and Consistency

Kuran's liberal approach is based on disregarding the classical Islamic school. It introduces a completely modern Islamic law that is not based on the classical one. Kuran's reinterpretation of Islam's call for community building opens the gate to introducing a modern Islamic corporation. Kuran's liberal approach requires the establishment of a modern Islamic law the exclusion of Islamic call for community building that prevented the formation of corporations a few centuries after the advent of Islam. In addition, he required the exclusion of the other reasons that prevented the development of the previously discussed forms from being incorporated a millennium later.

Consequently, Kuran's approach introduces another tree that stands with the classical Islamic law that is represented as a tree and stands against *Zahraa's* proposal. However, it has different roots, trunk and leaves. The roots of this tree are limited to the *Qur'ān* since Kuran is affiliated to the *Qur'aniyūn*. However, almost all liberal groups include the *Sunnah* and the *Hadith* of the prophet. These roots exclude the analogy (*Qiyās*) and the consensus since they represent a degree of human interference. Also, this tree does not have the detached roots like that of *Zahraa's*. Additionally, this tree has only one trunk which is the concept of legal personality instead of *Zahraa's* concepts of *'ahliyyat al-wujūb* and *dhimma*. Finally, similar to *Zahraa's* proposal it has one branch of leaves which is the branch of *mu'amalāt*. It differs from the classical law that has two branches of *mu'amalāt* and *'ibadāt*.

This reinterpretation focuses on the main sources of Islamic law. Although the reinterpretation in both cases constitutes legislation, they differ from each other. Kuran is a direct interpretation of the *Qur'ān* which is directly related to God's will. But *Zahraa's* approach is an indirect interpretation of the main sources of Islam. He focuses on the reason that made classical scholars interprets the legal status of natural persons. Then he assumed that these scholars would have dealt with juristic persons in the same manner that they dealt with natural persons. Consequently, he reinterpreted the concepts of *'ahliyyat al-wujūb* and *dhimma* to be applicable to juristic persons.

The probability of having contradicting liberal proposals is a possibility. However, the liberal approach guarantees the consistency of each possible proposal. This is attributed to that the liberal scholar has to follow a down-up trajectory that starts from the main sources of Islamic law to reach the aimed conclusion. This differs from utilitarianism approach that provides contradicting conclusions to the main Islamic classical discussions. Although the proposals focused on the discussions on natural persons and the concepts of legal capacity and *dhimma* to constitute the concept of legal personality, their choice to the elements of legal capacity led to disagree on the Islamic forms that enjoy the legal personality concept.

The liberal approach guarantees the immunity of classical Islamic discussions on natural persons from any probable deviation from the basic direction drawn by classical Islamic jurists. In addition, it provides a modern Islamic corporation that is based on the main sources of Islamic law and shows the way that should be followed in introducing other modern corporations. This is contrary to *Zahraa's* approach. More importantly, the effect of both approaches extended to the structure of classical Islamic law.

## **B. The Structure of Classical Islamic Law**

*Zahraa's* and Kuran's approaches vary in their effect on the structure of classical Islamic law. On one hand, *Zahraa* reversed the structure adopted by classical Islamic scholars in declaring the presumed legal status of natural persons that is based on typology to be based on conceptualization. In addition, he assumed the similarity of the structure of the classical discussions on natural persons and juristic persons. On the other hand, Kuran respects the peculiarity of the classical structure and called for the foundation of a parallel modern Islamic legal structure for legal persons. *Zahraa* and legal conceptualization will be followed by Kuran and "legal parallelism."<sup>283</sup>

### **1. *Zahraa* and Legal Conceptualization**

Classical Islamic law is based on typology. Typology can be defined as the systematic classification of the types of something according to their common

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<sup>283</sup> "Legal Parallelism" is used by Robin Bradley Kar to distinguish between law and morality. See ROBIN BRADLEY KAR HOW TO UNDERSTAND THE RELATIONSHIPS AND DISTINCTIONS BETWEEN LAW AND MORALITY, AS WELL AS THEIR RESPECTIVE AUTHORITIES: LEGAL PARALLELISM (University of Michigan, 2004).

characteristics. For example, partnerships in classical Islamic law are gathered under three main types; *sharikat al-'ibāhah*, co-ownership (*sharikat al-milk*) and *sharikat al-'aqd*.<sup>284</sup> Each type of partnerships is regulated by rules of their own. In contrast, legal modernization is based on conceptualization or generalization. Conceptualization means the process of forming a conceptual form of ideas. For example, partnership taxation is the concept of taxing a partnership business entity. This concept is applied on all partnerships disregarding their differences.

However, Classical Islamic law does not include any types of corporations. Even, it does not include any related discussions to the establishment or the prohibition of corporations. *Zahraa* recognized that the only organized discussions concerning the declaration of a presumed legal status relates to the fetus and the missing persons as natural persons. This is attributed to that classical Islamic scholars were preoccupied by discussing the rights and duties of human beings. In contrast, classical scholars did not introduce any discussions concerning corporations. Consequently, *Zahraa* worked on two levels that negatively affected the classical Islamic law. On the first level, he reversed the structure of the classical discussions concerning natural persons. On the second level, he assumed the similarity of the structure of the classical discussions on natural persons and juristic persons.

The first level that *Zahraa* worked on is reversing the classical structure of Islamic law. The structure of classical Islamic law takes the form of an inverted pyramid. This is represented in the widest part at the top of the pyramid reflects the most substantial, and important parts of the discussions of the classical scholars. And the tapering lower portion illustrates the concluded elements that are of diminishing importance. *Zahraa* followed this structure in case of natural persons. The discussions of the legal status of the fetus and missing persons represent the widest part at the top of the pyramid and the elements of *'ahliyyat al-wujūb* and *dhimma* represent the tapering lower portion of the pyramid.

*Zahraa* reversed this organization through returning the pyramid to its original form. The widest upper portion of the pyramid represents the most substantial, and important parts of the legal concepts. These concepts are *'ahliyyat al-wujūb* and

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<sup>284</sup> See IMRAN AHSAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATION PARTNERSHIPS 4 at, 35 (The Other Press, 1998).

*dhimma* which are the attributes to human beings. And the tapering lower portion of the pyramid illustrates the application of these concepts on natural persons. This portion includes all the discussions on natural persons. Additionally, it includes any possible future discussions on natural persons.

On the second level, *Zahraa* assumed the similarity of the structure of the classical discussions on natural persons and juristic persons. Accordingly, *Zahraa* imitated the structure in case of natural persons and applied it to Islamic entities. The concepts of '*ahliyyat al-wujūb*' and *dhimma* represent the widest part at the top of the pyramid and their application on the Islamic entity of *waqf* represent the tapering lower portion of the pyramid. This structure guarantees the inclusion of other Islamic entities with the Islamic entity of *waqf*.

The change in the classical structure reflects a major transformation from a legal system that is closer to the common law system to be closer to the civil law system. Similar to common law legal system, classical Islamic legal system is a case law system in which the precedents plays the main role in the legal development. This guarantees the continuous renewal of Islamic law through relying on judges that played a major role in classical Islamic law. This explains why classical Islamic law thoroughly discussed the rights and duties of the fetus and the relatives of the missing persons. According to the modern proposal of *Zahraa*, the structure is closer to the civil law system since the Islamic concepts of '*ahliyyat al-wujūb*' and *dhimma* have more importance than the presumed legal status. This made it easier for *Zahraa* to apply these concepts on Islamic entities.

In short, not only did *Zahraa* change the classical structure of the discussions on natural persons, but also it formed a radical change in the nature of the legal system adopted. As a result, this change transferred it from a legal system that is closer to the common law system to be closer to the civil law system. This is contrary to Kuran who established a legal system for corporations that is closer to the civil law system without interfering in the nature of classical Islamic law. But his liberal approach requires the founding of modern parallel structure for Islamic corporations which is unrelated to classical Islamic law.

## 2. Kuran and Legal Parallelism

Kuran aims at having two parallel and completely independent structures: a classical structure for natural persons and a modern structure for Islamic entities. The classical structure that takes the form of an inverted pyramid stays unaffected. The classical Islamic structure is characterized by specialization. This means that the applicability of these discussions is limited to the case of the legal status of natural persons especially the fetus and the missing persons. Consequently, the concepts of *'ahliyyat al-wujūb* and *dhimma* are the attributes of human beings and not of the Islamic entities.

The modern structure is established especially for Islamic entities and it takes the form of a pyramid. This pyramid is not based on the classical one. It is based on modern structure that is completely distinct from the classical structure. Accordingly, corporations will enjoy for main characteristics of any business corporations.<sup>285</sup> These characteristics are legal personality, limited liability, transferable of shares and centralized management under a board structure. These characteristics result in the founding of Islamic corporations instead of the Islamic concepts of *'ahliyyat al-wujūb* and *dhimma*

Kuran's liberal approach preserves the original classical structure in two ways. First of all, it preserves the classical structure that is closer to that of common law legal system from being distorted. Although the modern structure is a civil law system, it does not transfer the classical one. Secondly, it does not need the search for Islamic concepts that are equivalent to the Western concept of legal personality. The classical Islamic concepts of *'ahliyyat al-wujūb* and *dhimma* are ignored since they are considered attributes of natural persons. As a result, there is a clear distinction between classical structure and modern one, and natural persons and legal ones.

The criticism that can be directed to the legal parallelism introduced by the liberal approach is a fear from its competitiveness to classical Islamic law. This is attributed to that Kuran's modern proposal proves that classical Islamic law is incomplete since it lacks any discussions concerning legal personality. This requires the reinterpretation

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<sup>285</sup> RC CLARK, CORPORATE LAW 2 (Aspen 1986); *See also*, HANSMANN ET AL., THE ANATOMY OF CORPORATE LAW 1 at, 2 (2004); C. A. COOKE, CORPORATION, TRUST AND COMPANY: A LEGAL HISTORY (1950).

of the main sources of Islamic law to reach a conclusion concerning a certain problem. In fact, legal parallelism guarantees the protection of classical Islamic law and prevents its distortion for the sake of proving that classical Islamic law is complete since it organizes the legal personality of Islamic entities.

#### **IV. Conclusion**

Utilitarianism and liberal religious approaches that dominate the Islamic legal scene are the inputs of *Muhammed Abdou's* theological doctrine. However, their disagreement on the method adopted by each approach made the comparison between them important. Utilitarianism religious approach deliberately selects the opinions that lead to a certain result and excludes the contradicting opinions of classical Islamic scholars. But liberal religious approach reinterprets the main sources of Islamic law disregarding any classical interpretations. In the case of Islamic corporations, *Zahraa* and Kuran represent both approaches consecutively.

The case of corporations constitutes an excellent point of comparison between both approaches due to the lack of any explicit texts in the main sources of Islamic law or in classical Islamic law concerning corporations or legal persons. It is a neutral point of comparison. Accordingly, although *Zahraa* considers that Islamic law recognizes legal personality concept which constitutes the main characteristic of corporations, Kuran considers that Islamic law only recognizes natural persons. This required following their arguments to find out how they reached these conclusions.

On one hand, *Zahraa* introduces a unique Islamic definition to legal personality concept through adopting the selective approach. He concluded that this concept is equally enjoyed by natural and juristic persons since it is based on legal presumption. With regard to natural persons, *Zahraa* selected the opinions that declared the presumed legal status of the fetus and the missing persons to constitute the beginning and end of natural legal personality. Concerning juristic persons, *Zahraa* selected the Islamic concepts of *'ahliyyat al-wujūb* and *dhimma* that formed natural personality and applied them to juristic persons. Both Islamic concepts correspond to the western concept of legal personality.

On the other hand, Kuran introduces an interpretation to Islam's call for community building that explains the non recognition of classical Islamic law to corporations as legal persons. Accordingly, Islam's community vision that explicitly replaced pre-Islam tribal system implicitly prevented the formation or the development of other personhood than that of the Islamic community. He proved his argument through following the historical development of Islamic organizations that he detected in two historical phases. A few years after the advent of Islam, this call concluded on having the Islamic entity of *waqf* as a substitution to corporations. A millennium later, other reasons prevented the formation of corporations like the stagnation of the entity of *waqf*.

The comparison between the methods of both approaches focuses on their effect on the content and structure of classical Islamic law. This comparison proves that while utilitarianism religious approach perceives a distorting method to the classical Islamic writings in order to prove that Islamic law recognizes corporations, liberal religious approach perceives a protecting method to the classical Islamic writings even if it proves that Islamic law does not recognize corporations. Concerning the content, *Zahraa's* approach distorted the Islamic content through introducing an inconsistent legal system that mingles between human and inhuman rules, the reinterpretation of Islamic concepts, introducing two types of legal personality, and its indecisive nature. But Kuran provides a consistent legal system that is based on the *Qur'ān* as the main source of Islamic law.

Concerning the structure, *Zahraa's* approach relies on conceptualization of the classical Islamic law. This approach distorted the main structure of classical Islamic law that is based on typology. In addition, it transfers the classical law that is closer to common law system to be closer to civil law system. But Kuran's approach relies on legal parallelism. This means the existence of modern rules for legal personality that is independent from that of the classical law that is limited to natural personality. Additionally, this approach does not affect the nature of the classical Islamic law that is closer to common law system. This guarantees the protection of classical law from any distortion in order to prove its complete nature.